80-2188 No.

Office-Supreme Court, U.S.
JUN 24 1981
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term 1980

FRIARTON ESTATES CORP., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Richard Ayres Givens
Botein, Hays, Sklar & Herzberg
200 Park Avenue
New York, New York 10166
(212) 867-5500
Counsel of Record for Petitioners

Roger F. Bloom
Gina Schachter
Botein, Hays, Sklar & Herzberg
Of Counsel for Petitioners

Question Presented for Review

Is it a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States for the City of New York to confiscate petitioners' real properties pursuant to summary judgment of *in rem* foreclosure for alleged nonpayment of real estate taxes where:

(a) The Courts of New York State refused to consider petitioners' defenses, supported by substantial evidence, that the taxes assessed are invalid and unconstitutionally confiscatory in that they are based on assessed valuations

(i) which are large multiples of the properties' fair market value and greatly in excess of the properties' ability to generate sufficient income to pay such taxes;

(ii) which failed to take into account large operating losses sustained by the properties for seven to ten years, caused by the combination of rigid New York City rent controls and extensive services required by the City and State of New York upon pain of substantial criminal and civil liability; and

(iii) which are grossly disproportionate when compared to the assessed valuations of other properties located in the City of New York, in violation of State law and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States;

(b) By a variety of procedural delays, the City of New York has blocked trial of tax certiorari proceedings (the only legal method available to petitioners for the purpose of obtaining reductions in the assessed

valuations of their properties), thus enabling the City to summarily foreclose on tax liens and acquire the properties without compensation; and

(c) The State Courts' reason for refusing to consider petitioners' defenses was that petitioners had failed to prepay allegedly conceded amounts, although

(i) prepayment of the substantial amounts claimed would not assure petitioners a trial on the merits of their constitutional and State law defenses within any foreseeable or reasonable time thereafter;

(ii) prepayment on the City's terms would require that petitioners waive substantial rights; and

(iii) the prepayment proposal was presented at the last minute in a so-called "settlement offer" while the City's motion for summary judgment was pending?

Parties to the Proceeding in the Court of Appeals of the State of New York

Petitioners Friarton Estates Corp., Brontel, Ltd., West Paterson 46 Corp., Rent Control Memorial Corp., BWIT Fifty-Fifty Street, Inc., and Mid-Central Properties, Ltd. are all parties to the proceeding in the Court of Appeals of the State of New York, whose order is sought to be reviewed. The other parties to the proceeding in the Court of Appeals are respondents, the City of New York, the Tax Commission and the Finance Administrator of the City of New York.*

* Petitioners are privately held corporations that have no parent companies, subsidiaries or affiliates, except that Friarton Estates Corp., Brontel, Ltd., West Paterson 46 Corp. and Rent Control Memorial Corp. may be deemed to be affiliates of each other, and BWIT Fifty-Fifth Street, Inc. is a wholly owned subsidiary of American Pacific Corp.

TABLE OF CONTENTS

	PAGE
Question Presented for Review	1
Parties to the Proceeding in the Court of Appeals of the State of New York	II
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Constitution of the United States, Fourteenth Amendment	3
Administrative Code of the City of New York	3
Statement of the Case	5
Presentation of Petitioners' Federal Question in the Courts of New York State	11
Reasons for Allowance of the Writ	13
I. The judgments ordering confiscation for alleged nonpayment of real estate taxes, with no realistic possibility of trial on the merits of the assessments, contradicted principles established by this Court	13
II. This case is of great public importance because the impact of *in rem* foreclosures based on massive overassessments, especially when combined with restrictions on income from real properties, mandated services and blockage of trials on the merits of the assessments, is widespread and catastrophic	15
Conclusion	17

TABLE OF CONTENTS TO APPENDIX

PAGE

Order of the Court of Appeals of the State of New York, March 26, 1981 ..... 1a

Order of the Appellate Division, First Department, December 18, 1980 ..... 3a

Order of the Supreme Court, New York County, August 31, 1979 ..... 5a

Amended Supplemental Judgment with Affidavit, Supreme Court, New York County, May 20, 1980 ..... 6a

Memorandum Opinion, Supreme Court, New York County, August 31, 1979 ..... 20a

Order and Decision, Supreme Court, New York County, January 3, 1980 ..... 25a

Documents Regarding City Delay of Petitioners' Tax Certiorari Trials and Delay of Such Trials Generally by the City 27a

Excerpt from Sur-Reply Affirmation of Assistant Corporation Counsel, Opposing Petitioners' Motion for Consolidation of Tax Certiorari Cases with *In Rem* Tax Foreclosure Action No. 29 ..... 27a

Order of Supreme Court, New York County, Staying "Inequality Calendar" 27a

Excerpt from Affirmation of Assistant Corporation Counsel, in Support of Application for Stay of "Inequality Calendar" 28a

Excerpt from Real Estate Weekly, "City Resumes Hearings Reviewing Tax Disputes [After Four Years of Suspension of Hearings]" 28a

Substance of City's So-Called "Settlement Offer" 29a

Excerpt from Letter from Assistant Corporation Counsel to Counsel for Petitioners 29a

PAGE

Reports of Widespread Problem of Abandonment of Rent-Controlled Properties Generally and Problem of Tax-Foreclosed Properties Held by the City of New York 30a

Statement of Assistant Secretary of the Treasury Robert A. Gerard on the Effects of Rent Control on the Abandonment of Rental Housing, Assessed Valuation and Taxation 30a

Excerpt from New York Times, "Approach to Rehabilitation of West Harlem's Housing" 31a

Excerpt from New York Times, "City Urged to Move Faster in Selling Foreclosed Housing" 33a

Criticism of Administration of New York City Real Property Tax Assessment System from Official Sources 34a

Excerpt from New York Times, "Study for City Calls Realty Tax 'Hideously Inequitable'" 34a

Excerpt from *Real Estate Inequalities in New York City,* Submitted by the Offices of the State Comptroller and the Special Deputy Comptroller for New York City 35a

Reports of City Refusal to Disclose Information Necessary for Obtaining Reduction of Assessed Valuation in Tax Certiorari Proceedings 37a

New York Times, "City Won't Let Analysts See Real Estate Sales Data" 37a

Excerpt from *City of Unequal Neighbors,* New York Public Interest Research Group 38a

Partial List of New York City and State Legal Requirements and Restrictions on Multiple Dwelling Owners Since 1943 (Not Compensated by Any Rent Increases or Otherwise) 41a

TABLE OF AUTHORITIES

PAGE

Cases:

Armstrong v. Manzo, 380 U.S. 545 (1965) 13

Bailey v. United States, 415 F.Supp. 1305 (D.N.J. 1976) 14

Freewalt Realty Corp. v. Finance Administrator and Tax Commissioners, N.Y.L.J. (Sup. Ct. N.Y. Co.), Dec. 5, 1980, p. 6 9

Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) 13

Rosewell v. LaSalle National Bank, 49 U.S.L. Week 4285 (1981) 13, 14

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 13

United States v. O'Connor, 291 F.2d 520 (2d Cir. 1961) 14

United States Constitution:

Fourteenth Amendment, § 1 ..... *passim*

New York State Constitution:

Article XVI, § 2 5

Statutes:

Federal:

28 U.S.C. § 1341 13

PAGE

State:

Administrative Code of the City of New York
§ 166-1.0 7
§ D26-51.01 6
§ D26-52.01 6
§§ Y51-1.0, *et seq.* 6
§ Y51-11.0 6
§§ YY51-1.0 *et seq.* 6
New York Real Property Law § 235-b 6
New York Real Property Tax Law § 306 5

Regulations:

New York City Rent and Eviction Regulations
§ 21 6
§ 22 6
New York City Rent Stabilization Code § 20 6

Other:

J. Jacobs, The Death and Life of Great American Cities (1961) 15

No.

IN THE

Supreme Court of the United States

October Term 1980

FRIARTON ESTATES CORP., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York entered in this proceeding on March 26, 1981, which dismissed petitioners' appeal as of right from a judgment confiscating their properties on the ground that "no substantial constitutional question is directly involved."

Opinions Below

The order of the Court of Appeals entered on March 26, 1981 was without opinion, as was the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on December 18, 1980, affirming the orders and the judgments below. The orders of the Supreme Court of the State of New York, County of New York, entered on August 31, 1979, granting summary judgment of foreclosure against petitioners' properties in favor of the City of New York were accompanied by a memorandum decision which is unofficially reported at *Matter of Foreclosure Action No. 29,* New York Law Journal, September 6, 1979, p. 4, col. 1, and reproduced in the Appendix (20a). The decision and order of the Supreme Court, New York County, denying petitioners' motion for a rehearing, filed January 3, 1980, is not reported. It is reproduced in the Appendix (25a).

Jurisdiction

The order of the Court of Appeals of the State of New York dismissing petitioners' appeal was entered on March 26, 1981. This petition was timely filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

Constitution of the United States, Fourteenth Amendment.

Section 1.

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Administrative Code of the City of New York.

> § D17-4.0 *Foreclosure by action in rem.*—a. Whenever it shall appear that a tax lien has been due and unpaid for a period of at least one year from the date on which the tax, assessment or other legal charge represented thereby became a lien, such tax lien except as provided in subdivision (b) of this section or otherwise provided by this title, may be summarily foreclosed in the manner provided in this title, notwithstanding the provisions of any general, special or local law and notwithstanding any omission to hold a tax sale prior to such foreclosure.
>
> * * *
>
> § D17-11.0 *Presumption of validity.*—It shall not be necessary for the city to plead or prove the various steps, procedures and notices for the assessment and levy of the taxes, assessments or other lawful charges against the parcels set forth in the list of delinquent taxes and all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid. A defendant alleging any jurisdictional defect or invalidity in such taxes, assessments or other lawful charges or in the foreclosure thereof must particularly specify in his answer such jurisdictional defect or invalidity and must affirmatively establish such defense. . . .

§ 166-1.0 *Proceeding to review tax assessment; contents of petition.*—a. Any person or corporation claiming to be aggrieved by the assessed valuation of real property may commence a proceeding to review or correct on the merits a final determination of the tax commission. . . .

b. Such review shall be allowed only on one or more of the following grounds, which must be specified in such petition:

1. That the assessment is illegal, and stating the particulars of the alleged illegality, or

2. That the assessment is erroneous by reason of over-valuation, or

3. That the assessment is erroneous by reason of inequality, in that it has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section, or other real property on the assessment rolls of the city for the same year, specifying the instances in which such inequality exists and the extent thereof, and stating that the petitioner is or will be injured thereby.

Statement of the Case

Petitioners are the owners, former owners and mortgagees of certain real properties (hereinafter "the properties") located in the City of New York. On July 6, 1977, the City of New York (the "City") commenced *In Rem* Tax Foreclosure Action No. 29 (New York County, Borough of Manhattan), seeking to take complete title to the properties because of alleged delinquencies in payment of real estate taxes. On August 31, 1979, the Supreme Court, New York County, granted summary judgment of foreclosure against the properties (5a, 20a)* and on May 20, 1980, amended supplemental judgments of foreclosure were entered (6a), among other things, directing transfer to the City of title to and possession of the properties.

The orders and judgments of foreclosure were granted to the City without any adjudication of the merits of petitioners' defenses that the taxes assessed are invalid and unconstitutionally confiscatory because they are based on assessed valuations:

(a) far in excess of fair market value (R 353, 533)** as shown by arms-length sales of the properties involved (R 478-479, 531) in violation of the New York State Constitution, Article XVI, § 2, and New York Real Property Tax Law § 306;

(b) so grossly disproportionate when compared to the assessed valuation of other real properties in New

* Page references to the Appendix are in the form "——a."

** Page references to the Record on Appeal before the Appellate Division, First Department, are in the form "R ——."

York City as to deny petitioners equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (R 105, 273-274, 352-353, 447); and

(c) arbitrarily fixed without regard to consistently large operating losses (R 308-315) sustained for seven to ten years as a result of:

(i) rigid City-mandated limitations on the rents that tenants can be charged pursuant to the New York City Rent and Rehabilitation (rent control) Law, which has been virtually unyielding since 1943 when it was originally instituted as an emergency wartime measure, and the more recently enacted (1969) Rent Stabilization Law (Admin. Code of the City of New York §§ Y51-1.0–Y51-18.0; City Rent and Eviction Regulations § 21; Admin. Code §§ YY51-1.0–YY51-7.0; Rent Stabilization Code § 20) (petitioner Friarton's tenants pay rents as low as $49.87, $59.40 and $62.08 per apartment per month [R 516]);

(ii) City-mandated requirements under the rent control law that owners provide ever-increasing "essential" services upon pain of substantial criminal and civil liability (City Rent and Eviction Regulations § 22; Admin. Code §§ Y51-11.0; D26-51.01 and 52.01); and

(iii) the new demands of the warranty of habitability imposed on all residential leases in New York by Real Property Law § 235-b (R 237-238, 323-324, 355, 463, 595, 601-603, 607), and numerous other restrictions (41a).

The judgments of foreclosure were also granted in spite of petitioners' contentions that they had not been afforded a trial on the merits of the assessed valuations of the properties because of a variety of procedural obstacles created by the City which virtually eliminated tax certiorari trials in New York County in cases in which inequality of assessment is claimed (R 73, 106-107, 239, 325, 353, 387, 448, 531, 533). Specifically, beginning in 1973 through the present, petitioners commenced tax certiorari proceedings pursuant to Section 166-1.0 of the Administrative Code of the City of New York (R 73, 106-107, 239, 325, 353, 447, 461) for the tax years 1972-73, 1973-74, 1974-75, 1975-76, 1976-77, 1977-78, 1978-79, 1979-80, 1980-81 and 1981-82 seeking reductions of the assessed valuations of the properties on the statutory grounds of (a) "over-valuation" and (b) "inequality". Petitioners claimed that the assessed valuations were fixed by the City in desregard of large operating losses incurred by the owners in carrying out their obligation to provide services required by City and State law. These substantial and continuing losses (R 308-315) make it impossible to pay the taxes imposed by the City out of revenues from the properties as limited by the City's rent control and rent stabilization restrictions (R 108, 131, 319; see also 41a).

Both prior to and after the commencement of *In Rem* Action No. 29, petitioners made every reasonable effort to obtain a tax certiorari trial. They assembled complex financial data required by the City as a condition to filing notes of issue, filed such notes of issue two years ago (R 540-541), and repeatedly and continuously requested immediate trial (R 130, 157, 611). They moved for trial preferences in the tax certiorari proceedings (R 102, 525) and for consolidation of the proceedings with *In Rem*

Action No. 29 (R 264-265). The motions were denied by orders entered on January 3, 1980 (25a) and May 20, 1980, respectively (6a).

Despite petitioners' efforts to obtain a day in Court to present evidence on the merits of their defenses, the City has been successful in preventing petitioners' tax certiorari cases from coming to trial. It has done so by means of the following pattern of conduct:

(a) Since approximately 1974, permitting virtually no trials of tax certiorari cases in New York County where inequality is claimed (R 448);

(b) Relegating all cases in which inequality of assessment is claimed to a separate "inequality calendar" without publishing any rules, guidelines or dates for trial (Respondent-Appellants' [petitioners'] Brief before Appellate Division, pp. 25-26; Respondents-Appellants' [petitioners'] Jurisdictional Statement before the Court of Appeals, pp. 8-9); and

(c) Resorting to numerous other deliberate delaying tactics such as not assigning City attorneys to these cases (R 531), refusing to hold settlement conferences required under the so-called "eight-month hearing" rule which was a legal precondition to proceeding to trial (R 610), and refusing to agree to trials—all with the effect, conceded by the City in the State Court proceedings of delaying certiorari trials "indefinitely" (27a).

Developments subsequent to the orders and judgments of the Supreme Court, New York County, have confirmed this pattern of obstruction. After oral argument on peti-

tioners' appeal to the Appellate Division, First Department, and prior to entry of the Appellate Division's order affirming the orders and judgments of foreclosure, the City applied for and obtained, in a proceeding entirely separate from those instituted by petitioners and in which they were not parties and not in any way represented, a Court-ordered stay of all cases on the entire "inequality calendar," without affording petitioners either notice or an opportunity to be heard (*Freewalt Realty Corp.* v. *Finance Administrator and Tax Commissioners,* N.Y.L.J. [Sup. Ct. N.Y. Co.], December 5, 1980, p. 6) (27a).

The Supreme Court, New York County, refused to consider petitioners' defenses that the taxes assessed were invalid and unconstitutionally confiscatory and hence that *in rem* foreclosure, in light of the unavailability of tax certiorari trials, constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. It did so on the ground that there had been "a default in the payments of the amount of taxes admitted by defendants to have been properly due" (23a). The Court further held that the procedural due process questions raised by petitioners had "been mooted by [their] failure to pay even those taxes which would have been due had the valuation been what [they] had claimed" (26a).

In fact, petitioners never conceded any net amounts were due the City (R 70, 103-104, 236, 322, 350).* Even if

* In an argument never adopted or referred to by the Supreme Court, New York County, or by the State Courts on appeal, the City also claimed on appeal that foreclosure was justified on the basis of alleged water and sewer delinquencies alone (City's brief before Appellate Division, First Department, p. 24). Petitioners dispute both the legal and factual basis for this contention. As with the primary

(footnote continued on next page)

the claimed amounts had been prepaid, petitioners had no assurance that they would obtain a trial on the merits of their certiorari claims within any reasonable or foreseeable time thereafter. The Court never offered to provide a trial on the merits if petitioners prepaid the amounts claimed, and no existing procedure would prevent foreclosure in the event such payments were made except upon waiver of substantial legal and constitutional rights. Specifically, the City's so-called "settlement offer" (29a), made when its motion for summary judgment was pending, was conditioned upon petitioners' waiver of basic rights:

> (a) Summary judgment would be entered *ex parte* upon petitioners' failure to pay within 60 days any additional amounts found due. Among other things, this would cut off their right to request an extension of time to pay or a stay (29a);
>
> (b) All pending motions seeking broader relief would have to be withdrawn (29a); and
>
> (c) These dictated terms would not be revealed to the tax certiorari court in any way (29a).*

---

tax, the amount of water and sewer charges was in dispute, since (a) many of the parcels are vacant and there was no water consumption (R 475-479); and (b) petitioners claimed that the City has deprived them of the right to collect rents sufficient to pay any such charges as a result of rent restrictions and the high cost of mandated services.

* The City also contended in an affirmation in connection with post-judgment proceedings here that a trial on over-valuation could only be had if petitioners waived their claims of inequality:

> "The owners may argue that they have the right to a trial on the basis of inequality but they cannot deny that they could have had a trial and/or settlement by now had they chosen to argue their case only on the basis of over-valuation. The choice was theirs and they should not now be heard to complain that the City is preventing a trial of their Certiorari case." (Affirmation of Hyman Weber, Esq. dated April 29, 1981.)

Petitioners appealed from the orders and judgments of the Supreme Court, New York County. On December 18, 1980, the Appellate Division, First Department, affirmed without opinion, and on March 26, 1981, the Court of Appeals of the State of New York dismissed petitioners' appeal as of right on the ground that "no substantial constitutional question is directly involved."*

Presentation of Petitioners' Federal Question in the Courts of New York State

Petitioners raised the federal question sought to be reviewed by this Court before the Court of first instance, the Supreme Court, New York County (R 72, 107, 108, 237-238, 322-323, 355, 525, 528, 533, 534, 546, 595). In opposition to the City's motion for summary judgment, petitioners contended that

> "the City through its deliberate bureaucratic delay and excessive, arbitrary and capricious regulations has . . . made it virtually impossible . . . to pay the spiralling costs of . . . real estate taxes, fuel, oil, utilities, repairs, maintenance and other legally mandated essential services [and] that the City . . . has created an actual and virtual confiscation of such property in violation . . . of the Fifth and Fourteenth Amendments of the United States Constitution . . ." (R 218-219).

* Petitioners thereafter initiated an action against the City of New York in the Federal District Court for the Southern District of New York under 42 U.S.C. § 1983, asserting that the totality of the City's conduct including but not limited to the *in rem* foreclosure judgments constituted a taking of property without due process of law in violation of the Fourteenth Amendment (*Friarton Estates Corp., et al.* v. *City of New York, et al.*, 81 Civ. 3022 [CLB]). The City has taken the position in that action that the decisions of the New York Courts are *res judicata* and conclusive upon petitioners in the federal action, and that petitioners' sole remedy is before this Court. To date, the District Court has not ruled on the contentions of any of the parties.

In support of their motion for reargument before the Supreme Court, New York County, petitioners further claimed that

> "the combined effect . . . of the Rent Control Laws, the clearly unconstitutional fractional tax assessments, and *In Rem* foreclosure laws constitutes an unconstitutional taking of property without due process of law" (R 533).

The State Court recognized that these issues were raised, although it refused to rule on them:

> "[I]f in fact the taxes were improperly over-assessed and if [petitioners] did not have a reasonable opportunity to obtain a proper assessment, [taking of title by the City pursuant to Title D of the Administrative Code] would be an unconstitutional taking of property without compensation . . . ." (22a-23a).

In its order and decision on petitioners' motion for reargument the Court specifically acknowledged that petitioners had raised "procedural due process questions" (26a), but held that such questions were "mooted" by petitioners' failure to prepay assertedly conceded amounts (26a).

Petitioners also raised their federal question on appeal before the Appellate Division, First Department (Respondents-Appellants' [petitioners'] Brief, pp. 22-26; Respondents-Appellants' [petitioners'] Reply Brief, pp. 11, 13), and the Court of Appeals of the State of New York (Respondents-Appellants' [petitioners'] Jurisdictional Statement, pp. 2-4, 5-8, 9-10). The Appellate Division affirmed the orders and judgments of the court below without opinion (3a), necessarily passing on the federal constitutional issue, and the Court of Appeals dismissed petitioners' appeal squarely on the ground that "no substantial constitutional issue is directly involved" (2a).

Reasons for Allowance of the Writ

I. The judgments ordering confiscation for alleged nonpayment of real estate taxes, with no realistic possibility of trial on the merits of the assessments, contradicted principles established by this Court.

The right to a meaningful hearing before irrevocable adverse action (such as here, confiscation of real property) is well established by numerous decisions of this Court. See *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

In *Rosewell* v. *LaSalle National Bank*, 49 U.S.L.Week 4285 (1981), this Court held a two-year delay in tax refund adjudications insufficient to justify District Court intervention under the Tax Injunction Act, 28 U.S.C. § 1341. The concurring opinion indicated that the two-year period "perhaps only barely" met Tax Injunction Act standards. 49 U.S.L.Week at 4292. Four members of this Court noted in dissent that "[i]n its discussion of the jurisdictional question presented by this case, the Court correctly assumes that the administration of Cook County's system of taxing real property has violated respondent's federal constitutional rights." 49 U.S.L.Week at 4292-3.

Here, there is far more egregious and deliberate delay, combined with extreme and confiscatory overassessment. Further, the Tax Injunction Act is obviously not a barrier to granting this petition for review by this Court. The City itself acknowledged the extreme delay of petitioners' tax certiorari proceedings when it asserted that consolidat-

ing its *in rem* foreclosure proceeding with petitioners' tax certiorari cases would delay the *in rem* proceeding "indefinitely" (27a). Moreover, the State Court denied petitioners' motions for trial preferences in the cases, some of which are now seven years old.

The State Courts ruled that petitioners' federal claims were "mooted" because they did not prepay assertedly conceded amounts which were vastly in excess of the value of the property (26a). But the City's so-called "settlement offer" permitting interim partial payments would have required petitioners to withdraw all motions before the State Courts, to consent to *ex parte* summary judgment in the event of a single late payment and to waive substantial other rights (29a).

Moreover, without knowing the ultimate tax burden on the property and with no reasonably prompt remedy, petitioners would have had to pay large amounts that would have been totally lost if significant reductions could not be obtained. The undeterminable tax burden would also make it difficult, if not impossible, to sell or obtain any financing on the properties. Compare *United States* v. *O'Connor*, 291 F.2d 520 (2d Cir. 1961); *Bailey* v. *United States*, 415 F. Supp. 1305, 1314 (D.N.J. 1976).

It seems clear from the opinions of the members of this Court in *Rosewell* that the principle of "pay first, contest later" is valid when and only when a reasonably prompt subsequent adjudication of the merits is clearly available. The contrary was the case here due to the deliberate actions of the City.

II. This case is of great public importance because the impact of *in rem* foreclosures based on massive overassessments, especially when combined with restrictions on income from real properties, mandated services and blockage of trials on the merits of the assessments, is widespread and catastrophic.

The properties here sustained large operating losses for many years because of the City's combined rent restrictions and mandatory services (R 308-315). These losses were not taken into account in the assessed valuations fixed by the City, which were large multiples of fair market value, as shown by arms-length transactions (R 478-479, 531). This problem is not unique to petitioners but is widespread in the City of New York. Thousands of properties are being taken by the City under similar circumstances, with catastrophic effects on the owners, the public and the City's long-term tax base (30a-33a).* The City has greatly exacerbated the widespread character of such harm by obtaining a Court-ordered stay of all tax certiorari cases in New York County in which inequality of assessment is claimed (27a), without notice to petitioners.

Moreover, the administration of the real property tax system in New York City has come under severe criticism even from official sources (34a-36a), including a study commissioned by the City itself which termed City assessments "hideously inequitable" (34a). There are also pub-

* As stated in J. Jacobs, *The Death and Life of Great American Cities*, p. 254 (1961): "The way to raise the tax base of a city is not at all to exploit to the limit the short-term tax potential of every site. This undermines the long-term tax potential of whole neighborhoods."

lished reports that the City has refused to permit taxpayers generally to gain access to evidence necessary to substantiate claims of inequality of assessment (37a-40a).

Petitioners' data indicate that New York City real estate taxes frequently exceeded fifty percent and reached as high as sixty-three percent of the gross revenues of these properties. However, petitioners were denied the opportunity to prove such facts at a trial in State Court (R 301). Such taxes—hardly unique to these properties alone—could be found confiscatory on their face.

Where a taxing authority imposes taxes, denies petitioners sufficient income to pay the taxes and to provide required services, and then refuses to take this into account in determining its assessed valuations, petitioners contend that confiscation in violation of due process has occurred. Petitioners' contentions below encompassed violations of State law, denials of equal protection, and confiscation without due process through the combination of City strangulation of revenues and impossibly escalating tax and required service costs. Denial of any opportunity to prove such claims is widespread, in violation of decisions of this Court, and is consequently of great public importance.

Confiscation of petitioners' properties by the City under these circumstances presents an important question of federal law which has not been, but should be, settled by this Court.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the order of the Court of Appeals of the State of New York.

Respectfully submitted,

RICHARD AYRES GIVENS
BOTEIN, HAYS, SKLAR & HERZBERG
200 Park Avenue
New York, New York 10166
(212) 867-5500
Counsel of Record for Petitioners

ROGER F. BLOOM
GINA SCHACHTER
BOTEIN, HAYS, SKLAR & HERZBERG
Of Counsel for Petitioners

APPENDIX

Order of the Court of Appeals, March 26, 1981

STATE OF NEW YORK COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-sixth day of March A.D. 1981

Present:

HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

1 Mo. No. 206

IN REM TAX FORECLOSURE ACTION NOS. 29 and 30
BOROUGH OF MANHATTAN.

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
5232	6	1599	49
1283	2	440	51
1284	2	440	52
2289	3	735	30
5314	6	1621	65

FRIARTON ESTATES CORP., RENT CONTROL MEMORIAL CORP., BRONTEL LTD., and WEST PATERSON 46 CORP.,

Appellants,

v.

CITY OF NEW YORK,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion upon the ground that no substantial constitutional question is directly involved.

/s/ JOSEPH W. BELLACOSA

JOSEPH W. BELLACOSA
Clerk of the Court

Order of the Appellate Division, December 18, 1980

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 18, 1980

Present:

HON. THEODORE R. KUPFERMAN, Justice Presiding
HAROLD BIRNS
ARNOLD L. FEIN
LEONARD H. SANDLER
VINCENT A. LUPIANO, Justices.

9511-12-13-14

IN REM TAX FORECLOSURE ACTION No. 29 & 30
BOROUGH OF MANHATTAN

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
5232	6	1599	49
1283	2	440	51
1284	2	440	52
2289	3	735	30
5314	6	1621	65

FRIARTON ESTATES CORP., RENT CONTROL MEMORIAL CORP., AND BRONTEL, LTD.,
Respondents-Appellants,
against

CITY OF NEW YORK,
Petitioner-Respondent.

An appeal having been taken to this Court by the respondents-appellants from four orders, each entered on August 31, 1979, and four amended supplemental judgments of the Supreme Court, New York County (M. Evans, J.), entered thereon on May 20, 1980, which, *inter alia*, granted the petitioner City of New York summary judgment of foreclosure in the respective actions, and which severed respondents' counterclaims, denied the defenses to foreclosure and stayed the City from any action until 10 days after entry,

And said appeal having been argued by Mr. Richard A. Givens of counsel for the appellants, and by Mr. Morris Einhorn of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the four orders and the amended supplemental judgments so appealed from be and the same are hereby affirmed, without costs and without disbursements.

ENTER:

/s/ FRANCIS X. GALDI
Deputy Clerk.

Order of the Supreme Court, New York County, August 31, 1979*

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM PART I, NEW YORK COUNTY

At the Courthouse thereof, 60 Centre Street, New York, New York 10007

Present:

Honorable Martin Evans,

Justice.

FORECLOSURE ACTION No. 29

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3666 [sic]	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
5232	6	1599	49
1283	2	440	51
1284	2	440	52
2289	3	735	30
5314	6	1621	65

Upon the foregoing papers this motion is decided in accordance with memorandum opinion.

Martin Evans
J.S.C.

Filed and entered
August 31, 1979

* Identical orders were filed and entered for each of four groups of parcels. All of the parcels are listed in the above caption.

Supreme Court, New York County, Amended Supplemental Judgment of Foreclosure with Affidavit, May 20, 1980*

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York at the County Courthouse, Foley Square in the Borough of Manhattan, City of New York, on the 15th day of May, 1980

Present:

HON. MARTIN EVANS, *Justice.*

Index No. 46001/77

IN REM TAX FORECLOSURE ACTION No. 29
BOROUGH OF MANHATTAN

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
2289	3	735	30
5232	6	1599	49
1283	2	440	51
1284	2	440	52
5314	6	1621	65

* Judgments with annexed affidavits that are identical except for the name of the owner were filed and entered for each of four groups of parcels. All of the parcels are listed in the above caption.

Upon reading the judgment of foreclosure, the decision of this Court and the affidavit of regularity previously filed in this In Rem Action, and upon reading and filing the annexed Notice of Motion and the annexed affidavit of Steven Leigh Gittleson duly sworn to on January 9, 1980, from which it appears that a List of Delinquent Taxes was filed herein on July 6, 1977; that the City of New York, in filing said list, complied with all the requirements of Title D of Chapter 17 of the Administrative Code of The City of New York; that the judgment of foreclosure entered herein provided for the severance of the above-captioned property from this action because of an answer interposed as to said property on or about September 16, 1977 by Martin R. Fine, Esq., as attorney for Friarton Estates Corp. [Brontel, Ltd. and Rent Control Memorial Corp.], owner[s] of said parcels, that said judgment of foreclosure gave leave to The City of New York to proceed against such answer to a final disposition under the caption of this action in the manner prescribed by law; that on or about August 11, 1978 The City of New York moved this Court for an order striking said answer, dispensing with a separate judicial sale of said property and granting a final judgment of foreclosure;

Now, upon reading and filing the said notice of motion dated July 24, 1978, the affidavit in support of said motion of Steven Leigh Gittleson, sworn to on July 24, 1978, the reply affirmation of Edward A. Friedman, dated October 16, 1978, the notice of cross-motion dated October 16, 1978 for leave to submit an amended answer in this matter and to consolidate the instant in rem matter with tax certiorari proceedings, the affirmation of Edward A. Friedman, dated October 16, 1978, in support of said cross-motion, and other supporting affidavits sworn to on or about October

16, 1978, the reply affirmation and affirmation in opposition to cross-motion of Steven Leigh Gittleson dated November 8, 1978, the reply affirmation of Edward A. Friedman, dated November 20, 1978, the sur-reply affirmation of Steven Leigh Gittleson, dated December 29, 1978, the sur-reply affirmation of Edward A. Friedman, dated January 15, 1979, the affidavit of Martin R. Fine, dated January 18, 1979; the order to show cause for consolidation of in rem tax foreclosure actions no. 29 and 30 and for certification of class action status, dated January 18, 1979, and the supporting affirmation of Martin R. Fine, dated January 17, 1979, the affirmation in opposition of Judah Dick, Assistant Corporation Counsel of the City of New York, dated February 28, 1979, the supplemental affirmation of Martin R. Fine, dated April 20, 1979, the supplemental affirmation of Judah Dick, dated April 24, 1979, and upon oral argument on the various motions and cross-motions and the submission reading and filing the further of all papers on April 25, 1979 and on supplemental affirmation of Martin R. Fine, dated April 29, 1979; and upon the decision of the Court dated August 31, 1979, denying defendant's motion for certification of class action status and granting defendant's motion for consolidation of the instant in rem tax foreclosure action no. 29 with action no. 30, and upon the further decision of the Court, dated August 31, 1979, denying defendant's cross-motion for consolidation of the instant in rem tax foreclosure action with tax certiorari matters, granting defendants cross-motion to amend its answer in in rem tax foreclosure action no. 29 but finding and determining thereafter that all of the defenses in said amended answer are without merit, and granting the City's motion for summary judgment, and

The only motion before the Court being the City's motion to strike the answer interposed in in rem action no. 29.

Now, on motion of Allen G. Schwartz, Corporation Counsel, attorney for The City of New York, it is

Ordered, that defendant's cross-motion for leave to serve and file the amended answer, without the second and fourth defenses and without the counterclaim is granted, there being no merit to the second defense and no legal basis for the fourth defense, and the pleading, as restated, is deemed to have been served; and it is further

Ordered, that defendant's counterclaims, which are not permitted in an in rem tax foreclosure action pursuant to Section D17-9.0 (d) of the Administrative Code of the City of New York, shall be severed and continued in a separate action, and it is further

Ordered, that defendant's cross-motion to consolidate the pending tax certiorari cases with the present in rem foreclosure action is denied, and it is further

Ordered, that the remaining first and third defenses in the defendant's amended answer are without merit and are thereby stricken from said answer, and it is further

Ordered, that defendant's motion for certification of class action status is denied, and it is further

Ordered, that defendant's motion to consolidate in rem tax foreclosure actions nos. 29 and 30 is granted, but that the plaintiff, City of New York, shall take title to the above-

captioned premises in in rem tax foreclosure action no. 29 only, and action No. 30 shall be discontinued in so far as such action affects the above-captioned premises, and it is further

ORDERED, that the City's motion for summary judgment is granted and it is further

ORDERED, that the judgment of foreclosure previously entered in this In Rem Action is hereby vacated insofar as said judgment severed the above-captioned property from said action, and it is further

ORDERED, ADJUDGED and DECREED that The City of New York is the owner and holder of unpaid tax liens affecting the above-captioned property in the amounts, together with interest thereon, as shown in the List of Delinquent Taxes on file herein, and it is further

ORDERED, ADJUDGED and DECREED that a separate judicial sale of the above-captioned property is hereby dispensed with and the Finance Commissioner of The City of New York is hereby directed to prepare, execute and cause to be recorded a deed conveying to The City of New York full and complete title to the above-captioned property, subject only to tax liens accrued or accruing subsequent to those contained in the List of Delinquent Taxes herein, and it is further

ORDERED, ADJUDGED and DECREED that upon execution of said deed by the Finance Commissioner of The City of New

York, the City of New York shall be seized of an estate in fee simple absolute in the above-captioned property, and other persons including the State of New York, infants, incompetents, absentees and non-residents who may have any right, title, interest, claim, lien or equity of redemption in or upon such property shall be barred and forever foreclosed of such right, title, interest, claim, lien or equity of redemption, and it is further

ORDERED, ADJUDGED and DECREED that upon execution of said deed, The City of New York shall have possession of the above-captioned property and such possession is hereby awarded.

The following is a description of the parcel of property as to which final judgment in favor of The City of New York is hereby granted, designating said parcel by Serial Number as the same appears in the List of Delinquent Taxes herein, and by section, block and lot numbers as the same appear on the Tax Map of The City of New York for the Borough of Manhattan and in the aforesaid List of Delinquent Taxes:

> All these certain lots, pieces, or parcels of land with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City and State of New York, more particularly designated on the Tax Map of The City of New York for the Borough of Manhattan as the said Map was on the 6th day of July, 1977 as follows:

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
2289	3	735	30
5232	6	1599	49
1283	2	440	51
1284	2	440	52
5314	6	1621	65

And, it is further

ORDERED, that petitioner, City of New York shall be permitted to enter and file this judgment but shall be otherwise stayed from taking any other action herein for the ten (10) days after entry.

Martin Evans
J.S.C.

Norman Goodman
Clerk

Filed and entered
May 20, 1980

Affidavit of Steven Leigh Gittleson, Annexed to Amended Supplemental Judgment

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

Index No. 46001/77

IN REM TAX FORECLOSURE ACTION No. 29

BOROUGH OF MANHATTAN

Serial No.	*Section*	*Block*	*Lot*
3365	4	1042	2
3366	4	1042	3
3367	4	1042	4
3368	4	1042	5
3369	4	1042	6
3370	4	1042	7
3376	4	1042	64
2289	3	735	30
5232	6	1599	49
1283	2	440	51
1284	2	440	52
5314	6	1621	65

State of New York)
County of New York)

STEVEN LEIGH GITTLESON, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel of The City of New York, in charge of the prosecution of the above-

captioned action, and fully familiar with all of the matters herein set fort

2. This affidavit is made for the purpose of procuring a judgment of foreclosure as to the above-captioned property pursuant to the provisions of Section D17-12.0 of the Administrative Code of The City of New York.

3. This In Rem Action was commenced by filing of a List of Delinquent Taxes, including the above-captioned property, in the office of the Clerk of New York County on July 6, 1977, and was concluded by the entry of a judgment of foreclosure on May 25, 1978. Said judgment was supported by a judgment roll consisting of exhibits; affidavits of filing, posting, mailing, publication and regularity, and by a decision of this Court made on May 25, 1978, containing a statement of the facts found and the conclusions of law thereon, all showing compliance by The City of New York with the requirements of Title D of Chapter 17 of the Administrative Code of The City of New York.

4. Said judgment of foreclosure provided for the acquisition by The City of New York, by a deed of the Finance Commissioner, of all parcels contained in said List of Delinquent Taxes as to which the failure to redeem or answer had resulted in a default in this In Rem Action, for the discontinuance of said In Rem Action and the cancellation of the lis pendens pertaining thereto as to all parcels as to which had been withdrawn, redeemed, condemned or included improperly or through error, and for the severance from this In Rem Action of all parcels as to which an answer had been interposed, with leave to The City of New York

to proceed against such answers to a final disposition under the caption of this action in the manner prescribed by law.

5. The above-captioned property was among the parcels severed from this In Rem Action because of an answer interposed on or about September 16, 1977 by Martin R. Fine, Esq., as attorney for Friartion [sic] Estates Corp. [Brontel, Ltd., and Rent Control Memorial Corp.], owner of said parcel.

6. On or about July 24, 1978, The City of New York, by a motion returnable on August 11, 1978, moved this Court for an order striking said answer, dispensing with a separate judicial sale and granting a final judgment of foreclosure. After service of the notice of motion on defendant's attorney but before the August 11, 1978 return date, Goldberg, Weprin and Ustin, Esqs., were substituted as the defendants's attorney of record in this matter. After several adjournments, defendant served upon the City the reply affirmation of Edward A. Friedman, dated October 16, 1978, responding to the City's notice of motion for summary judgment and a notice of cross-motion, dated October 16, 1978, for leave to submit an amended answer in this matter and to consolidate the instant in rem matter with tax certiorari proceedings, together with an affirmation of Edward R. Friedman, dated October 16, 1978, in support of said cross-motion, and other supporting affidavits sworn to on or about October 16, 1978. Thereafter, the City served an affirmation in reply to defendant's opposition papers concerning the City's motion for summary judgment, dated November 8, 1978 and an affirmation in opposition to defendant's cross-motion, dated November 8, 1978. Thereafter further reply papers were served by the respective

parties, to wit, the reply affirmation of Edward A. Friedman, dated November 20, 1978, the sur-reply affirmation of Steven Leigh Gittleson, and the sur-reply affirmation of Edward A. Friedman, dated January 15, 1979.

7. On or about January 19, 1979 defendant served a motion by order to show cause to consolidate In Rem Tax Foreclosure Actions No. 29 and 30 and to certify owners of property included in said actions for class action status, toegther with supporting affirmation of Martin R. Fine, dated January 17, 1979. The City of New York opposed such order to show cause by an affirmation of Judah Dick, Assistant Corporation Counsel of the City of New York, dated February 28, 1979. Thereafter supplemental affirmations concerning the various above mentioned motions and cross-motions were filed; to wit, the supplemental affirmation of Martin R. Fine, dated April 20, 1979 the supplemental affirmation of Judah Dick, dated April 24, 1979 and the affirmation of Martin R. Fine, dated April 29, 1979. On April 24, 1979 the various motions and cross-motions were argued orally before this Court.

8. In the decisions of the Court per Justice Evans dated August 31, 1979, the following determinations were made:

(a) Defendant's motion for certification of class action status was denied.

(b) Defendant's motion for consolidation of the instant In Rem Tax Foreclosure Action No. 29 with Action No. 30 was granted.

(c) Defendant's cross-motion for consolidation of the instant In Rem Tax Foreclosure Action with Tax Certiorari matters was denied.

(d) Defendant's cross-motion to amend its answer in In Rem Tax Foreclosure Action No. 29 was granted, but it was found and determined thereafter that all of the defenses in said amended answer were without merit.

(e) The City's motion for summary judgment was granted.

9. Since the City has made a motion for summary judgment in In Rem Tax Foreclosure Action No. 29 only, and said motion was granted by the Court and since the City has not yet submitted judgment papers in In Rem Tax Foreclosure Action No. 30, the annexed supplemental judgment of foreclosure concerns Manhattan Action No. 29 only.

10. In view of the fact that the City's motion has been granted, The City of New York is entitled to a judgment providing the relief requested in said motion. Since a judgment of foreclosure as to this In Rem Action has already been entered under the caption of said action, it is now necessary for this Court to make its supplemental judgment under said caption as to the above-captioned property. Since the judgment of foreclosure previously entered as this In Rem Action was supported by a full and complete recitation as to the City's compliance with all of the requirements of Title D of Chapter 17 of the Administrative Code of The City of New York, it should not be necessary to encumber this record by a repetition of said lengthy recital as to the City's compliance with said code in support of the supplemental judgment now required to [be] entered. Such repetition can be avoided by vacating judgment of foreclosure previously entered as to this In Rem Action insofar as it severed said action as to the above-captioned property.

Such vacatur would re-assert and re-attach as to said property the judgment roll submitted by the City in this In Rem Action and the decision of this Court dated May 24, 1978, insofar as said instruments show compliance by The City of New York with the requirements of Title D of Chapter 17 of Administrative Code of The City of New York. The supplemental judgment of foreclosure to be rendered and entered in this In Rem Action as to the above-captioned property should accordingly provide as follows:

a. Granting the City's motion in all respects.

b. Vacating the judgment of foreclosure previously entered in this In Rem Action insofar as said judgment severed the above-captioned property from said action.

c. Striking the answer interposed as to the above-captioned property.

d. Dispensing with a separate judicial sale of the above-captioned property.

e. Awarding to The City of New York possession of the above-captioned property.

f. Directing the Finance Commissioner of The City of New York to prepare and cause to be recorded a deed conveying to The City of New York full and complete title to said real property subject only to tax liens accrued and accruing subsequent to those contained in the List of Delinquent Taxes.

g. Decreeing that upon the execution of such deed, The City of New York shall be seized of an estate in fee simple absolute in such real property and barring and forever foreclosing any and all persons, including the the State of New York, infants, incompetents, absentees

and non-residents who may have had any right, title, interest, claim, lien or equity of redemption.

No previous application has been made for the relief sought herein.

/s/ STEVEN LEIGH GITTLESON

STEVEN LEIGH GITTLESON

Sworn to before me this
9 day of January, 1980

/s/ HYMAN WEBER

HYMAN WEBER
Notary Public, State of New York
No. 41-9560005
Qualified in Queens County
Commission Expires March 30, 1980

Supreme Court, New York County
Memorandum Opinion, August 31, 1979

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: SPECIAL TERM PART I

Index #46001/77

Motion No. 136

Also 131, 132 & 134

FORECLOSURE ACTION No. 29

against

Serial No.	*Section*	*Block*	*Lot*
2289	3	735	30

MARTIN EVANS, J.:

In foreclosure action No. 29, the City moves for summary judgment under CPLR 3212. The action was instituted on or about July 16, 1977 by filing a verified list of delinquent taxes, and defendants interposed an answer on or about September 16, 1977. In their answer, in addition to a general denial, as part of which it alleged that the taxes properly due were paid, it alleged that its equity was greater than the tax and requested a severance for the purpose of sale. It also interposed a counterclaim, seeking damages in the sum of $1,000,000 alleging that the City, through the concurrent imposition of rent control and tax increases, made payment of taxes impossible and had the result of an unconstitutional taking of its property.

Defendant, by way of crossmotion, seeks several different grounds of relief. It seeks, first, to consolidate with this foreclosure action, four pending certiorari cases which were instituted by it, or by its predecessors [sic] title, which sought a reduction in the taxes that had been assessed against the property.

It also seeks leave to serve and file an amended answer. In its proposed amended answer, in addition to its general denial, it proposes four defenses and the same counterclaim it had originally interposed. The first defense, based on a claim that its equity is larger than the taxes due, requests, under Adm. Code D 17-9.0(e) a six month extension of time to have the property sold.

Its second defense alleges the unconstitutionality of the In Rem statute, alleging that the recent reduction of the statutory period of time from 3 years to 1 year creates an impermissable [sic] bias in favor of one and two family dwellings and thus denies any protection to the owners of other buildings. That claim was passed upon and held to be without merit in the well-reasoned opinion of Justice Greenfield in *Sonmax, Inc.* v. *City of New York* 89 Misc 2d 945, aff'd 43 NY 2d 253.

Its third defense alleges that there is a tax certiorari proceeding to reduce taxes, and that it would be inequitable to foreclose for the failure to pay the tax at a time when it is claimed the taxes should not be assessed at the amount claimed by the city.

The fourth defense alleges that the change in the In Rem foreclosure period from 3 years to 1 year lacks the approval of the State Legislature and conflicts with the New York State Real Property Tax Law and is therefore

illegal. There is no basis for this defense. See *Sonmax, Inc.* v. *City of New York, supra.*

It is settled law that leave to amend a pleading is freely given, unless prejudice is shown. The Court has power, however, if it desires to exercise it, to examine the pleading in order to determine whether or not there is merit to it.

In the instant case, there is patently no merit to the second and fourth defense.

Furthermore, counterclaims are not permitted in a foreclosure action such as this. Adm. Code D 17-9.0(d). Although there may be merit to that claim in that the remedy for a shortage of housing caused by a wartime emergency in 1943 may itself have become the cause of the present day shortage of housing, see *Benson Realty Corp.* v. *Beame,* Sup. Ct. Kings County, Sp. I, 180 NYLJ No. 66, Oct. 4, 1978, Page 13; *HDA-CHIP,* 90 Misc.2d 813 this action is not the proper vehicle for it. It is to be severed and continued.

The motion for leave to serve and file the amended answer, without the second and fourth defenses, and without the counterclaim, is granted, and the pleading as restated, is deemed to have been served.

Defendant's motion, to consolidate the pending tax certiorari cases with this foreclosure action, is denied. No note of issue was filed by the petitioner in those certiorari cases nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein.

It would, of course, be inequitable to allow In Rem foreclosure under Title D of the Administrative Code, which could result in a transfer of title to the City, if in fact the taxes were improperly over-assessed and if defendant did not have a reasonable opportunity to obtain a proper

assessment. Such a transfer of title would be an unconstitutional taking of property without compensation. However, the issue, as to whether or not the tax assessments were in the proper amounts, is tendered by the 2nd paragraph of the answer, in which it is alleged that all taxes and assessments which were lawfully assessed, have been paid. If that can be proved, defendant would have a defense to this foreclosure action.

With respect to the City motion for summary judgment under CPLR 3212, the City has shown that taxes were properly assessed and have not been paid. Although the pleadings of the defendant allege that all taxes lawfully due have been paid, it is clear from the affidavits submitted on the motion that not only is there a default in the payment of the amount of taxes assessed; there has been a default in the payments of the amount of taxes admitted by defendants to have been properly due.

Essentially, their defense to that showing, is that they were unable, by reason of other economic considerations, to make those payments. That is not a defense to this action, although it may be the basis for their counterclaim.

The 1st defense, which only requests an extension of time for six months in order to enable the sale of the property, has been given practical effect by the delay in these proceedings; and no longer constitute a valid defense.

Defendants' reliance on the determination by the Court of Appeals in *Hellerstein* v. *Assessor of Town of Islip*, 37 NY 2d 1, is misplaced. Although the Court did hold the practice of fractional assessment to be in violation of statute, it specifically refused to disturb previously settle [sic] assessment rolls or to declare them a nullity. Recog-

nizing the difficulties of transition, its direction was prospective only.

The motion by the City for summary judgment is accordingly granted.

Dated: 8/29/79

Martin Evans
J.S.C.

Filed and entered
August 31, 1979

Supreme Court, New York County
Order and Decision, January 3, 1980

SUPREME COURT OF THE STATE OF NEW YORK

SPECIAL TERM PART I, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York 10007

Present:

HONORABLE MARTIN EVANS

Justice.

REM TAX FORECLOSURE ACTION

Nos. 29 & 30 Borough of Manhattan

Serial No.	*Section*	*Block*	*Lot*
3365 et al.	4 et al.	1042 et al.	2 et al.

Upon the foregoing papers this motion seeking *inter alia*, to reargue the decision of this Court dated August 31, 1979, is denied. Movant has failed to meet its burden of proving that the Court misunderstood, misconstrued, overlooked or incorrectly decided any question of law or fact. Movant has attempted to relitigate matters already decided after intensive deliberation by the Court, and to litigate matters which are neither material nor relevant to this proceeding, *e.g.*, the theoretical and factual merits of the rent control laws. The Court is constrained to

observe that movant's excessively prolix papers are inappropriately argumentative. They largely raise public policy questions which worded in substantive due process language, are matters which must ultimately be decided by the Legislature, not the Judiciary. Insofar as they raise procedural due process questions, such have already been mooted by movant's failure to pay even those taxes which would have been due had the valuation been what movant has claimed.

Dated: 12/27/79

Martin Evans
J.S.C.

Filed and entered
January 3, 1980

Documents Regarding City Delay of Petitioners' Tax Certiorari Trials and Delay of Such Trials Generally by the City

Excerpt from Sur-Reply Affirmation of Assistant Corporation Counsel, Dated December 29, 1978, Opposing Petitioners' Motion for Consolidation of Tax Certiorari Cases with *In Rem* Action No. 29 (R 170)

"It is submitted that an order of Consolidation would work an extreme hardship upon the City, and would in effect forestall any remedy to the City for defendants' extreme tax delinquencies indefinitely."

Order of Supreme Court, New York County, Staying "Inequality Calendar," New York Law Journal, December 5, 1980, p. 6

"*Freewalt Realty Corp* v. *Finance Administrator and Tax Comissioners*—The inequality calendar of this court in all respects is stayed pending final Appellate determination of Colt Industries v. Tax Commission of the City of New York, or further order of the Appellate Division."

Excerpt from Affirmation of Assistant Corporation Counsel, Dated October 29, 1980, in Support of Application for Stay of "Inequality Calendar," Supreme Court, New York County

"I submit this affirmation in support of respondents' application for a stay of proceedings on the inequality calendar of this Court including litigation of the value of the subject properties."

Excerpt from *Real Estate Weekly*, December 11, 1978, p. 1, "City Resumes Hearings Reviewing Tax Disputes [After Four Years of Suspension of Hearings]"

"New York City will resume its real estate tax review proceedings on assessments on a full-time basis beginning in January.

"The hearings were suspended for nearly four years because they were found to be 'ineffective,' according to Tax Commissioner Mary E. Mann."

Substance of City's So-Called "Settlement Offer"

Excerpt from Letter, Dated February 8, 1979, from Assistant Corporation Counsel to Counsel for Petitioners, Conditioning Partial Payment Proposal upon Waiver of Rights by Petitioners (R 194)

"It is . . . proposed that your clients make a partial payment limited to the taxes due on the claimed value set forth in your petitions for review of assessments, plus all water charges, sewer rents and accrued interest, The City Collector to apply such payments to the oldest open items. Should the Court fix values above your claimed values, your clients will then pay the balance within 60 days and consent to the City's entry of summary judgment ex parte upon their failure to do so. All pending motions will be withdrawn. It is understood that this arrangement will be incorporated into a stipulation and that it will not be introduced in any way at the certiorari trial."

Reports of Widespread Problem of Abandonment of Rent-Controlled Properties Generally and Problem of Tax-Foreclosed Properties Held by the City of New York

Statement of Assistant Secretary of the Treasury Robert A. Gerard on the Effects of Rent Control on the Abandonment of Rental Housing, Assessed Valuation and Taxation, November 2, 1976 (R 491)

"Our office has carefully analyzed numerous objective studies which support the conclusion that rent control has adversely affected the City's economic condition.

"I think you will be interested in the following economic facts which enumerate the adverse effects of rent control:

"*Abandonment* — Since 1960, approximately 300,000 housing units have been lost through abandonment.

"In the last five (5) years alone, the housing stock has lost 25,000 to 30,000 units per year, primarily through abandonment.

"*New Housing* — Less than 15% of New York City's rental housing stock has been constructed since 1960.

"New housing unit starts declined from a peak of nearly 71,000 in 1962 to less than 4,000 in 1975.

"Rates of new construction in abutting jurisdictions which do not have rent control—e.g. northern New Jersey —are substantially higher than in New York City.

"*Value and Taxation* — The aggregate assessed valuation of multi-family residential property declined $1 billion from $12.5 billion to $11.5 billion—from 1974 to 1975.

"The market value of rent control property declined 31% in 1974; values of property subject to rent stabilization declined 18% in 1974.

"Aggregate real estate tax arrearage through fiscal year 1975 was nearly $500 million.

"Real estate tax arrearage in fiscal year 1976 alone is estimated to be $234 million.

"22.6% of walk-up buildings—predominantly rent-controlled—are delinquent in tax payments.

"I want to assure you that we will continue to take a firm stand on this matter, emphasizing the importance of phasing out rent control as quickly as possible. Only by such action can New York City strengthen its real estate tax base, slow the rate of abandonments, and foster a climate that will encourage investment in new construction and better maintenance of existing rental units."

Excerpt from New York Times, October 10, 1980, p. A 23, "Approach to Rehabilitation of West Harlem's Housing"

"Galen Kirkland, deputy director of housing for the [Harlem Community] organization, estimates that 40 percent of all privately built housing in West Harlem has fallen into city hands through tax foreclosure.

* * *

"... the Department of Housing Preservation and Development is wary about taking too many buildings in one lump without adequate resources to manage them. So it divided the Manhattan takings into three parts, and last month it took about 100 occupied Manhattan buildings with an estimated 1,200 tenants, plus about 150 vacant buildings.

They are in East Harlem, Washington Heights, midtown and part of lower Manhattan, but not West Harlem or the Lower East Side. The next West Harlem taking is scheduled for March.

* * *

"One of the first steps of the community managers is to lift rents to at least $40 a room, the minimum necessary for successful management, as buildings are made habitable.

* * *

". . . Mr. Kirkland says that the city's procedures to speed up takeovers of tax delinquent buildings is not helping to preserve housing.

" 'The law isn't working', he said. 'The only thing it's doing is bringing more buildings into city ownership. The city thought the owners would be more responsible and keep their taxes up to date. It hasn't happened. The landlords are still walking away.' "

Excerpt from New York Times, November 21, 1980, p. B 9, "City Urged to Move Faster in Selling Foreclosed Housing"

"... William B. Eimicke, deputy commissioner of property management in the [New York City] housing department ... concedes the department's reluctance to resume the selling of occupied tax-foreclosed buildings, especially larger ones. Such sales run the risk of bringing the property back into city hands within a few years, he said, a 'revolving door' that brought the department into control of the management of tax-foreclosed property in the first place.

• • •

"The city is holding 35,000 occupied apartments in about 4,100 buildings, run by a staff of 1,000. In addition, 420 handymen and 1,800 superintendents are financed through private contracts. The federally financed cost is $80 million a year ...."

Criticism of Administration of New York City Real Property Tax Assessment System from Official Sources

Excerpt from New York Times, April 24, 1981, p. 1, "Study for City Calls Realty Tax 'Hideously Inequitable' "

"A study prepared for New York City's Department of Finance has concluded that property tax assessments in the city are "hideously inequitable," favoring wealthier neighborhoods over poorer areas and owners of private homes over apartment dwellers.

"The system by which the city taxes the 830,000 parcels of real estate in the five boroughs is really a "nonsystem," the report said. It added:

" 'Our present assessment nonsystem is yet another signal to the world that this city—which once was the best-governed of large American cities—has a municipal government that doesn't work.'

"Yesterday, when asked about the study's findings, Mayor Koch called them 'unacceptable,' although he said that it was 'no secret that the current tax assessment system is inequitable and needs to be revamped.'

• • •

"The study was commissioned in 1979 and was coordinated by Dick Netzer, dean of New York University's Graduate School of Public Administration and a leading authority on municipal finances and taxation. It was intended to help the city form an overall policy in the long, often heated debate on overhauling tax-assessment procedures.

• • •

". . . The report said, broad disparities have arisen between essentially similar properties because of the city's failure to reassess many real-estate parcels over the years."

Excerpts from *Real Estate Inequalities in New York City Among Similar Types of Property*, pp. i-ii, Submitted to the Financial Control Board and Municipal Assistance Corporation of the State of New York by the Office of the State Comptroller and the Office of the Special Deputy Comptroller for New York City, May 1, 1981

"This report analyzes the results of property tax administration in New York City. At present the City taxes different types of property at different effective tax rates —commercial property is taxed at a greater proportion of its true value than are one and two family homes and apartment dwellings. These disparities, however, which were declared illegal in the landmark *Hellerstein* decision, are not the focus of this study. (Although the practice was held to violate existing State statutes, it is within the power of the legislature to amend those statutes so as to permit a classification system where different property types are taxed at different effective tax rates.) Rather, this report focuses on disparities within similar types of properties. Within each such group we found that properties are assessed and hence taxed at different proportions of their full value. This practice is not only inequitable, but most experts agree that it may not carry out one of the basic constitutional guarantees, that of equal protection under the law.

"The report analyzes the extent of these disparities for the City's eight major property types* and estimates the extent of tax shifts that are necessary if all property *of the same type* is to be taxed equally, even if the total tax burden for the property type remains unchanged. In preparing our analysis, we reviewed sales and assessment

* Footnotes have been omitted.

data for some 125,000 parcels encompassing all major property types and areas of the City.

"Our review indicated that there are gross assessment inequities within each property type and neighborhood in the City. Within each of these groupings, assessments do not bear any rational relationship to the true value of the properties and to the value placed on other property of similar type. Thus, taxpayers have no assurance that their tax bills are fair. Furthermore, contrary to popular belief, such disparities are even greater among income producing properties than they are among one and two family houses."

Reports of City Refusal to Disclose Information Necessary for Obtaining Reduction of Assessed Valuation in Tax Certiorari Proceedings

New York Times, November 10, 1980, p. B 3, "City Won't Let Analysts See Real Estate Sales Data"

"New York City, facing numerous challenges that its real estate tax assessments are far below market values and discriminate among classes of property, has refused to make official real estate sales data available to analysts for the first time in five years of studies.

"The refusal follows reports by the Center for Local Tax Research of so-called 'effective tax rates.' In these, the center has calculated, for example, that in 1978, the city taxed residential property at $2.15 per $100 of averaged sales values.

"State law, as interpreted by the Court of Appeals in 1975 requires that real estate be assessed at full value. Since 1977, the city's official tax rate has been $8.75 per $100 of assessed valuation, and is due to rise to $8.95 on Jan. 1, 1981.

"Philip Finkelstein, director of the center and a former deputy city administrator, disclosed yesterday that the center's request for the city's aggregated 1979 data on sales had been turned down because the data was 'confidential.'

"Harry S. Tishelman, who just resigned as City Finance Commissioner to become district director in the Small Business Administration, explained the refusal by saying that sales records had been put on computer tapes that included tax returns filed when an owner sold property, and that this information must be kept secret.

"Mr. Tishelman said that the data were also sought by persons suing for tax refunds from the city based on claims of inequality in assessing classes of property, as well as individual property."

Excerpt from *City of Unequal Neighbors: A Study of Residential Property Tax Assessments in New York City*, p. 3 and Appendix B, New York Public Interest Research Group, 1981

"Roadblocks to Studying Property Taxes in New York City: The City Covers Up

"As of now, a New York City homeowner would find it an impossible job to determine the accuracy of his/her property tax assessment. NYPIRG was required to expend resources far beyond the capability of even the most tenacious taxpayer-activist in our exploration of the fairness of the City's property tax system.

"The City's response to our requests for information was one of consistent delay and evasion. This experience leads to one inescapable conclusion: The City believes that its administration of the property tax has become so oppressive it must prevent citizens from reviewing its performance. The City has evidently decided to cover up the mess.

"NYPIRG's difficulties in obtaining the necessary information from the City is detailed in Appendix B.

• • •

"APPENDIX B

"NYPIRG was forced to launch an expensive, time-consuming six month campaign to obtain the basic information necessary to review residential property taxes. When we began the project, we were told that the first and most essential step was to acquire the City's "sales file," a listing of recent residential selling prices and assessments. Any other data sources concerning residential property values would have been incomplete, of uncertain reliability and far too costly to compile.

"In the past, the sales file had been made available routinely to property tax researchers. We were thus dismayed to learn that the City had changed its policy in the last year and was refusing to release the file to legitimate researchers. The City denied a request for the data made by us last July under the New York State Freedom of Information Law. (Public Officers Law Sections 84-90).

• • •

"The City's position flew in the face of reason. For one thing, it had been the City's own policy to make the sales files available to *bona fide* researchers who committed themselves to respecting the privacy rights of homeowners listed in the file.

"In addition, both the assessment and the selling price of individually identifiable homes are on public file in borough offices of City agencies. (The staggering number of homes sold in a given year—over 25,000—rules out these documents as a data source for an assessment sales study.) Finally no promise of confidentiality is made to the seller or buyer on the Real Property Transfer Tax return forms. No expectations of privacy are created, and none could be

as selling prices for individual homes are a matter of public record in the City Clerk's offices where deeds are recorded.

"The City's concern for homeowners' confidentiality was an apparent fraud. The only possible aim could be to place roadblocks in the way of academic researchers and public interest groups wishing to evaluate the work of City officials in administering the property tax."

Partial List of New York City and State Legal Requirements and Restrictions on Multiple Dwelling Owners Since 1943 (Not Compensated by Any Rent Increases or Otherwise)

New York City Rent and Rehabilitation (Rent Control) Law

(Administrative Code of the City of New York § Y-51.1.0, *et seq.*)

(a) prevents any rent increases without specific approval of City;

(b) grants virtual lifetime tenancy to tenants and tenants' family including future family members without limit;

(c) requires substantial essential services to be provided;

(d) provides criminal penalties up to two years' imprisonment for violations; and

(e) permits indefinite lease renewals by tenants at no increase in rent.

Housing Maintenance Code, 1967

(Title D, Chapter 26, Administrative Code of the City of New York, added by Local Law 56)

Added new obligations of owner for:

(a) installation of central heating systems and maintenance of heat on a twenty-four hour a day basis;

(b) supplying of hot water to all dwelling units;

(c) installation of electric lights in all public halls and all rooms in dwelling units, and requirement of

exterior lights in all public courts, area, stairs, halls, etc. between sunset and sunrise; and

(d) provision of janitorial services and numerous other requirements.

Local Law 71, Enacted 1968

Imposed new obligations on owners to install, repair and replace all sidewalks (City-owned property) adjacent to building.

Multiple Dwelling Law

(Chapter 496, Laws 1970 (Sec. 50-a-[3]))

Requires immediate installation of automatic self-locking doors and intercom systems.

Public Health Law, Title X

(Chapter 338, Laws 1970)

Requires removal or covering of all lead paint in apartments and authorizes "receivership" of building to enforce compliance.

Local Law 8, Enacted 1971

Additional heavy-duty lock sets and other equipment required to be installed.

Local Law 17, Enacted 1973

Required installation of new fire doors and frames and related equipment in "old law" tenements.

Local Law 17, Enacted 1974

Repeal of provisions of "maximum base rent" laws that permitted labor cost "pass-alongs" to tenants.

Rent Stabilization Law

(Chapter 576, Laws 1974)

Repealed "vacancy decontrol" and made "decontrolled" apartments again subject to rent control.

Real Property Law

(Section 235-b, Chapter 597, Laws 1975)

Enacted "warranty of habitability" for all tenants, substantially increasing services required.

Real Property Law

(Section 226-b, Chapter 549, Laws 1975)

Restricted owners' right to prevent subleasing of apartments.

Local Law 83, Enacted 1979

Requires building owners to clean substantial portions of public streets and roadways.

Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2188

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRIARTON ESTATES CORP., et al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
the City of New York,
Attorney for Respondents.
100 Church Street
New York, N.Y. 10007
(212) 566-4338 (or 4375)

LEONARD KOERNER,
MORRIS EINHORN,
of Counsel.

No. 80-2188

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRIARTON ESTATES CORP., et al.,

Petitioners,

vs.

THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Petitioners purchased, subject to heavy tax delinquencies, 11 parcels of real property on the List of Delinquent Taxes prepared by the City of New York preliminary to in rem foreclosure of the City's tax liens

thereon. They were afforded repeated opportunity to pay those delinquencies on the installment plan, e.g., 15% down and the balance over 8 years, or to pay only such amount as would be payable for real property taxes on the tax delinquents' claimed taxable values as self-assessors, pending judicial review and "correction" thereof. The question presented, therefore, is whether petitioners were denied due process of law by the Courts of the State of New York in granting judgments of foreclosure on finding (22a-23a, 26a) - that petitioners had mooted any due process question as to prior review of ad valorem real property assessments by their "failure to pay even those taxes which would have been due had the valuation been" what they claimed it should be; and that they had unreasonably delayed ju-

dicial review of those assessments for eight years - particularly where foreclosure was required for water and sewer delinquencies alone on 10 of the parcels, in any case (Nelson v. City of N.Y., 352 U.S. 103 [1956]).

TABLE OF CONTENTS

	Page
Question Presented.....	i
Jurisdiction.....	1
Statement of the Case.....	2
Statement of Facts.....	6
Opinions Below.....	17
Relevant Statutory Provisions.....	20
ARGUMENT	
THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION PRESENTED. TAX DELINQUENTS ARE NOT DENIED DUE PROCESS WHERE THEY ARE AFFORDED ADMINISTRATIVE REVIEW OF AD VALOREM ASSESSMENTS, REFUSE PAYMENT UPON THEIR OWN CLAIMED TAXABLE VALUES PENDING JUDICIAL REVIEW OF ASSESSMENTS, JUDGMENT OF FORECLOSURE IS REQUIRED FOR WATER AND SEWER DELINQUENCIES ALONE, AND THEIR COUNTERCLAIMS FOR RENT REGULATION "DAMAGES" ARE PRESERVED FOR TRIAL.....	28
a. Petitioners' constitutional claims are based on flagrant distortions of the record.....	28

Page

b. Petitioners were afforded a far higher standard of due process than is required by firmly settled law..... 35

Conclusion..... 47

TABLE OF AUTHORITIES

Cases:

Benson v. Beame, 50 NY 2d 994 (1980), app. dism. ___ U.S. ___ (1981-49 U.S. Law Week 3530)..... 35

Botens v. Aronauer, 32 NY 2d 243 (1973)..... 37

Bowles v. Willingham, 321 U.S. 503 (1944)..... 35

Bull v. United States, 295 U.S. 247 (1935)..... 39

Chapman v. Zobelein, 237 U.S. 135 (1915)..... 39

City of N.Y. (801-805 E. New York Ave.), 290 N.Y. 236 (1943)..... 37

Colt Industries, v. Tax Comm., 183 N.Y.L.J. (No. 108), June 4, 1980, p. 10, affd. 439 N.Y.S. 2d 24..... 42

TABLE OF AUTHORITIES cont'd

	Page
Grant v. Srogi, 52 NY 2d 496 (1981)..	32, 38
Great Lakes Co. v. Huffman, 319 U.S. 239 (1943).....	38
Hagar v. Reclamation District, 111 U.S. 701 (1884).....	37
Hersee v. Porter, 100 N.Y. 409 (1885).....	37
Hickman v. Wujick, 488 F. 2d 875 (2d Cir., 1973).....	37
King v. Mutlins, 171 U.S. 404 (1898).....	36
Leigh v. Green, 193 U.S. 79 (1904)...	36
McGregor v. Hogan, 263 U.S. 234 (1928).....	37
Mtr. of Appl'n of McMahon v. Palmer, 102 N.Y. 176 (1887).....	37
Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974).....	36
Nelson v. City of N.Y., 352 U.S. 103 (1956).....	iii, 34
Phillips v. Commissioner, 283 U.S. 589 (1931).....	39

TABLE OF AUTHORITIES cont'd

	Page
Pittsburgh & C. Ry. Co. v. Backus, 154 U.S. 421 (1894).....	37
Pittsburgh & C. Ry. Co. v. Bd. of Public Works, 172 U.S. 32 (1899)....	37
Plaza Mgmt. Co. v. City Rent Agency, 25 NY 2d 630 (1969).....	34
Reiner v. Boyland, 278 App. Div. 580 (2d Dept., 1951), lv. den. 302 N.Y. 951 (1951).....	38
Rosewell v. LaSalle National Bank, 49 U.S. Law Week 4285 (1981).....	42
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).....	36
Sonmax, Inc. v. City of N.Y., 43 NY 2d 253 (1977).....	12, 17, 32
The State Railroad Cases, 92 U.S. 575 (1876).....	39
Utley v. St. Petersburg, 292 U..S. 106 (1934).....	37
Vil. of Charlotte v. Keon, 207 N.Y. 346 (1913).....	35

Statutes: **Page**

Federal:

28 U.S.C. §1341..... 43

State:

N.Y. Real Property Tax Law §720(3)..... 42

Gen. Mun. Law, §3-a..... 44

Administrative Code of the City of N.Y. Chapter 17, Title D (Foreclosure by Action In Rem)..... 20-25

§166-1.0..... 42

N.Y.C. Charter, §§163-166..... 26-27, 38

Other Authorities:

3 Cooley on Taxation (4th ed.) §1326..... 37

Jurisdiction

The order of the Court of Appeals of the State of New York entered March 26, 1981, dismissed petitioners' appeal as of right from four judgments of the Supreme Court, New York County (entered May 20, 1980) directing that title to 11 parcels of real property be conveyed to the City of New York for non-payment of tax delinquencies - said appeal being dismissed by the Court of Appeals "upon the ground that no substantial constitutional question is directly involved" (1a-19a).* Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

---

*Numerals in parentheses followed by small letters (e.g., 1a) refer to pages of Petitioner's Appendix, and those following the letter R refer to pages of the Record before the Appellate Division.

Statement of the Case

Petitioners have resorted to flagrant distortions of the record before the New York State Courts, even "supplementing" that record with choice extracts, dehors the record, from newspapers, "reports," etc. (28a, 30a-40a) to bolster their unsupportable contention that foreclosure of tax liens by the City of New York (hereafter City) resulted in "a deprivation of property without due process of law in violation of the Fourteenth Amendment" (Petition, p. I).

As the record shows, however, those Courts were confronted with tax delinquents who had purchased at nominal amounts, and subject to heavy tax delinquencies, parcels already scheduled for in rem foreclosure of tax liens, and then sought to frustrate collection by casting the City as the real de-

linquent. Thus, for example, one of the petitioners, Rent Control Memorial Corp., purchased its parcel shortly prior to the City's foreclosure action for $1,000 "subject to existing tax liens which are unpaid since July 1, 1974" totaling $11,407, and then counterclaimed therein for $100,000 in damages because of rent control (R189, 479, 395-399). Petitioners' second tactic was to assert, as a defense in the foreclosure action, that their parcels were assessed at "large multiples of fair market value" (Petition, p. 15) - which was belied by the record proof that upon "settlement resulting from hearing" before the City's Tax Commission, they had withdrawn their tax review proceedings for a 22% reduction on 7 of the 11 parcels here involved for 1977/8 and 1978/9 (R117-119). Petitioners' final ploy was to charge the

City with delaying trial of proceedings to judicially review assessments on the subject parcels dating from 1971/2 - a device recognized as specious by the New York Courts in pointing out that "No note of issue was filed by the petitioner in those certiorari cases nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein" (22a).

In the 2-year interval between the City's motion to dismiss these various "defenses" and the granting of foreclosure judgment in May of 1980, every effort was made to keep petitioners in title - the City offering to accept a token 15% of delinquencies with the balance payable on installments over an 8-year period, or in the alternative, payment based upon taxable values as claimed in the petitions for judicial review of the

real property assessments pending that review (infra, pp. 14-15). When these offers were rejected by petitioners and the State Courts forced to recognize that they were dealing with speculators in tax delinquent parcels unwilling to pay a dime in tax arrears under any circumstances, judgments foreclosing the City's tax liens were granted and appeals therefrom rejected by the Appellate Division and Court of Appeals. Petitioners' attempt to supplement its abusive attacks upon the City by incorporating in the Appendix to its Petition various diversionary newspaper articles and similar data dehors the record, cannot obscure the hard record proof that the New York Courts fully protected petitioners' right to due process and that petitioners' contrary contention is farcical - as will be shown.

Statement of Facts

(1)

On July 6, 1977, the City commenced a proceeding in the Supreme Court, New York County (Action No. 29), pursuant to N.Y.C. Admin. Code, ch. 17, title D (Foreclosure by Action In Rem) to foreclose tax liens on all parcels in Manhattan delinquent one or more years in payment of taxes (R. 7, 12). Three years of delinquencies in payment of real estate taxes, water and sewer charges had by then accrued against 10 of the 11 parcels here involved - i.e., against the 8 parcels of petitioner Friarton Estates Corp. (Friarton); against the parcel of petitioner Brontel, Ltd.; and against one of the two parcels of petitioner Rent Control Memorial Corp., the other parcel (Block 440 - Lot 51) having two years of real estate

tax delinquencies and no arrears for water or sewer charges (R. 84-90, 250-257; R. 336; R. 411, 409-411).*

One month prior to commencement of Action No. 29 in July of 1977, Friarton acquired one of its 8 parcels (Lot 30 in Block 735), "consisting of approximately 12 tenanted buildings," for $10,000 cash "subject to existing tax liens" in excess of $200,000 and to a purchase money mortgage of $45,000 (R. 185-6, 199, 217, 477-8). Friarton's remaining 7 parcels

*Friarton's 8 parcels were Lots 2-3-4-5-6-7 and 64 in Block 1042, and Lot 30 in Block 735 (R. 7, 17, 27, 37). Brontel's parcel was Lot 49 in Block 1599 (ibid). While Action No. 29 initially included 3 parcels of petitioner Rent Control Memorial Corp. (Lots 51 and 52 in Block 440, and Lot 65 in Block 1621), the City subsequently acquired title to Lot 52 in Block 440 on July 14, 1978 in Foreclosure Action No. 28 (R. 185, 476) - so that Foreclosure was sought against only two of those 3 parcels in instant Action No. 29.

were similarly acquired in June of 1977 for "the total sum of approximately $10,000 cash over real estate taxes and mortgages," tax arrears alone then exceeding $150,000 (R. 478-9, 186-190, 200-206). Friarton thereafter agreed in June of 1978 to a 22% reduction in the assessment of those 7 parcels (from $580,000 to $452,000) for 1977/8 and 1978/9 upon "settlement resulting from hearing" before the Tax Commission (R. 117-119).

Petitioner Brontel, Ltd. had acquired its parcel for $900 on City auction of tax delinquent property in October of 1975 (R. 188, 479). And petitioner Rent Control Memorial Corp. had similarly purchased one of its two parcels at City auction of tax delinquent parcels for $2,500 in October of 1975, its other parcel (Bl. 1621 -

Lot 65) having been acquired in October of 1976 for $1,000 "subject to existing tax liens which are unpaid since July 1, 1974" totaling $11,401 (R. 189, 479).

(2)

In September of 1977, each petitioner herein submitted an identical answer in Action No. 29 by the same attorney (Martin Fine), who was also Friarton's president (R. 70, 236, 322, 395).* Friarton's answer, for example, asserted a counterclaim for $1 million on the ground that rent control had "virtually confiscated" petitioners' property, and foreclosure of tax liens would "actually confiscate the real property * * * for unlawful and unconstitutional political

*Friarton submitted two such answers - one on Block 735 - Lot 30, and a second on the 7 parcels in Block 1042 - Lots 2, 3, 4, 5, 6, 7 and 64 (R. 70, 236).

purposes" (R. 72, 238, 324, 396). A second counterclaim for severance and separate sale was also interposed in each answer, petitioners claiming that their equities in the property were "greatly in excess" of delinquencies and since tax review proceedings were pending "alleging that the real estate tax assessments for tax years 1972-3, 1973-4, 1974-5, 1975-6, 1976-7 and 1977-8 are illegal by virtue of overvaluation," refunds would increase that equity (R. 73, 239, 325, 398).

In July of 1978, the City moved to strike those answers, pointing out, among other things - that the 6-month period statutorily afforded petitioners to sell their property and retain any equity above delinquencies (N.Y.C. Admin. Code, §D17-9.0[e]) had long expired; that petitions to review assessments, dating from 1963/4, had not only been stricken from the calendar for failure to prosecute, but "at no

time has a note of issue been served or filed" by petitioners for trial of any subsequent petition to judicially review any other real property tax assessments on the subject parcels; and that redemption is available both before and after summary foreclosure of tax liens (R. 75-83, 241-249, 327-336, 400-408).

Petitioners thereupon cross-moved in October of 1978 for leave to file amended answers and to consolidate their tax review proceedings with in rem Action No. 29, each of the proposed amended answers demanding "additional time in which to pay said taxes," challenging the City's one-year in rem statute as unconstitutional, and again including a $1 million counterclaim for "confiscation" effected by rent control (R. 98-110, 265-277, 345-357, 453-465). Opposing these cross-motions

as "a dilatory tactic manufactured to prolong this proceeding," the City pointed out that the constitutionality of its one-year in rem statute had been upheld in Sonmax, Inc. v. City of N.Y., 43 NY 2d 253 [1977]); that petitioners, in any case, had acquired their parcels subject to many years of tax delinquencies; that defaults in failing to file a note of issue on any petition for review of real property tax assessments could not justify further delay of tax collection, particularly since a "clear remedy" by way of a token payment with the balance payable on installments over many years was available to petitioners to afford them adequate opportunity to bring their tax review proceedings to trial (R. 120-5, 142-150; R. 284-298; R. 372-377, 388-393; R. 428-433).

Petitioners' response was to unilaterally "consolidate" the subject 11 parcels with 6 additional tax delinquent parcels in Action No. 29, which additional parcels had been purchased at City auction of properties previously foreclosed for unpaid taxes, and with respect to which tax review proceedings were similarly pending (R. 152-164, 189-191; R. 167, 171, 177). And in January of 1979, petitioners moved to consolidate Action No. 29 with In Rem Action No. 30 and for class action status on behalf of all tax delinquents listed therein (R. 435-9).*

*On August 28, 1978, In Rem Action No. 30 was commenced against all parcels in Manhattan delinquent one or more years in payment of taxes, the subject parcels being again included therein for subsequent delinquencies (R. 183).

(3)

In response to these various tactics, the City advised the Court in February of 1979 that although petitioners were speculators in tax delinquent properties and their motions "merely a dilatory tactic to delay foreclosure," the City had nevertheless offered them an installment agreement "under Local Law No. 34 of 1978" whereby a 15% down payment on delinquencies with the balance payable over 8 years would enable them to calendar and prosecute their tax review proceedings (R. 182-197). It was further reported that upon petitioners' rejection thereof, the City had offered to treat petitioners as self-assessors and to accept payment of only "the undisputed taxes, water charges and sewer rents and accrued interest based on defendants' own valuations in the certiorari petitions [for review of

real property tax assessments], and provided the balances were paid within sixty (60) days of the determination of those certiorari proceedings" (R. 182, 192; R. 194-197).

In April of 1979, the City further advised the Court that its offer to accept payment of real estate taxes based on the taxable values claimed in the tax review petitions, pending judicial review of assessments, had been accepted as to the 6 parcels which petitioners had unilaterally consolidated herewith, the City having, as a precondition thereto - "insisted that the certiorari proceedings be calendared, so that a final determination of assessments can be made" (R. 508-510). It was further pointed out that - "None of the petitions have ever been calendared to date, except for the 6 parcels where we stipulated to withdraw the motion" for summary foreclosure on condition that they

be so calendared; and that with respect to the remaining parcels, the tax delinquents declined to even "pay the water and sewer charges with accrued interest, let alone anything on account of taxes" (R. 509-510).*

Petitioners' reply was that the City should be "estopped from continuing its In Rem foreclosure" even as to water and sewer charges because of "unclean hands" due to the City's rent control laws and real property assessments (R. 512, 520). And since the City Council has "again engaged in pure chicanery and trickery for political

*The stipulation dealt with the 6 parcels acquired at City auction of tax delinquent parcels and "consolidated" herewith by petitioners (ante, p. 13). It provides for payment of "all water and sewer charges with accrued interest to date, as well as a portion of the accrued real estate taxes based on the amount of taxes due under defendant's claimed value," and specified that petitioners "shall take all steps necessary to bring on its petitions to trial" (R. 590-592).

purposes" in continuing rent control, payment of water and sewer charges could not be countenanced because "to pay even one further dime of tribute to the City, acting in its so-called police power run amok would be unconscionable" (R. 511-513, 518).

Opinions Below

(1)

One year after the city had moved (in July of 1978) to strike petitioners' answers and to grant judgment summarily foreclosing its tax liens, the City's motions were granted in August of 1979 (20a-24a). The Court found petitioners' defenses (in their proposed amended answers) based on alleged unconstitutionality of the City's 1-year in rem statute to be devoid of merit since it had been upheld in Sonmax v. City of N.Y., 43 NY 2d 253 (21a). Stating that a statutory pro-

ceeding to summarily collect taxes "is not the proper vehicle" for an attack upon rent control as confiscatory, the Court severed and continued each of petitioners' $1 million counterclaims therefor (22a).

Denying petitioners' application to consolidate In Rem Action No. 29 with petitioners' tax review proceedings, the Court pointed out that no note of issue had been filed so as to bring those tax proceedings to trial, albeit they covered tax years as far back as 1971/2 - "nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein" (22a). Petitioners' claim of payment was not only unsupported by any evidence thereof, said the Court, but disproven by the City, the record showing that petitioners had refused to pay even "the amount of taxes admitted by defendants to have been properly due" based on the

claimed taxable values set forth in the petitions to review the real property assessments (22a-23a).*

(2)

In denying reargument, the Court made it plain that petitioners refusal to pay real estate taxes based on their own claimed taxable values as self-assessors, so as to obviate any possible injury from delayed refund of excessive taxes, had mooted any conceivable due process question - "insofar as they raise procedural due process questions, such have already been mooted by movant's failure to pay even those taxes which would have been

*In a separate decision rendered that same day (August 31, 1979), the Court denied class action status (R. 56). While granting consolidation of In Rem Actions 29 and 30, the Court's judgments directed that the City take title to the subject parcels in Action No. 29 - and that "Action No. 30 shall be discontinued insofar as such action affects" the subject parcels (R. 56).

due had the valuation been what movant has claimed" (25a-26a).

The Court's four amended supplemental judgments of foreclosure were entered on May 20, 1980 and affirmed without opinion by the Appellate Division (First Judicial Department) on December 18, 1980 (3a-4a, 6a-12a). Appeal to the New York State Court of Appeals was dismissed upon the ground that no substantial constitutional question was directly involved (1a-2a).

Relevant Statutory Provisions

a. N.Y.C. Admin. Code, Ch. 17, Title D ("Foreclosure by Action In Rem") [2A Williams, 1976 ed., pp. 185-207].

(1)

At the time instant Action No. 29 was commenced in July of 1977, Admin. Code ch. 17, title D provided that - "Whenever it shall appear that a tax lien has been due

and unpaid for a period of at least one year from the date on which the tax, assessment or other legal charge represented thereby became a lien, such tax lien *** may be summarily foreclosed in the manner provided in this title" (N.Y.C. Admin. Code, §D17-4.0[a]).*

To summarily foreclose such tax liens, the City's Finance Administrator is required to prepare "a 'list of delinquent taxes,' of all parcels within a particular borough or portion of a borough" detailing the amounts and dates of all unpaid tax liens subject to foreclosure; and the filing thereof in the County Clerk's office commences the proceeding with the same force and effect as the filing of a separate lis pendens and

*A tax lien is statutorily defined as "any unpaid tax, assessment, sewer rent, sewer surcharge or water rent and interest or penalty thereon which is a lien on real property" (§D17-1.0).

complaint "as to each parcel described in said list" (§D17-5.0[a-c]).

(2)

Notice by posting, publication and by mail to all owners and to lienors is statutorily required, advising that any parcel on said list may be redeemed by paying all taxes and charges within 10 weeks of first publication or within the additional 20 day period for filing an answer "and that in the absence of redemption or answer a judgment of foreclosure may be taken by default" (§D17-6.0 [a-b]).

Within that redemption period, "any parcel in said list may be redeemed by paying all taxes and charges in said list of delinquent taxes" - and thereafter, "a late redemption payment * * * shall be accepted by the finance administrator" until preparation

of foreclosure judgment in the in rem action has been commenced (§D17-7.0). If an answer is submitted - the "defendant shall have the right to a severance of the action"; to "additional time in which to pay the taxes and interest or to have the property sold" so that he may retain any surplus above the City's tax liens; to pay the delinquencies at any time prior to the striking of his answer on motion; and to effect such redemption on installments over a 4-year period upon down payment of "at least 25% of such arrears" (§D17-9.0 [a, c, e]; §D17-13.0[a], as amended by L.L. No. 45 of 1976).*

*N.Y.C. Admin. Code, §D17-11.0 provides that "all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid." Pursuant to §D17-9.0 (b, d) - "'No counterclaim may be asserted in an answer interposed in an action brought pursuant to this article," but proof of payment "or that the property was not subject to tax shall constitute a complete defense."

Upon determining that "there has been due compliance by the City with the provisions of this title," the Court shall direct the finance administrator to execute and record a deed to the City as to any tax delinquent parcel not redeemed or withdrawn or as to which an answer has been stricken (§§D17-9.0[c], D17-12.0). Any party "who had an interest in said property as either owner, mortgagee, lienor or encumbrancer" may demand release thereof within 4 months from the time the City's deed is recorded, upon payment of arrears plus 5% thereof (§D17-25.0 [a, f, d]) - an installment plan for payment being available as hereafter noted. And upon expiration of that 4-month period for release on such demand, an additional 20-month period for release in the discretion of the Board of Estimate is also afforded by §D17-25.0(g).

Statutory amendments have repeatedly afforded grace periods for more liberal "payment of delinquent taxes and charges in installments." N.Y.C. Admin. Code §D17-26.0 (3 month grace period from May 9, 1979 to July 31, 1977); §D17-27.0 (4 month grace period from Dec. 1, 1977 to March 31, 1978); §D17-28.0 (5 month grace period from Sep. 1, 1978 to Jan. 31, 1979). During those periods, any parcel on the list of delinquent taxes could be withdrawn therefrom upon agreement to pay 15% of delinquencies and the balance by quarterly installments over twice the delinquency period, not to exceed 8 years. And similar installment agreements were likewise available upon demand for mandatory release made within 4 months of execution and recording of tax deeds to the City (§§D17-26.0[c], §D17-27.0[c]; §D17-28.0[c]).

b. N.Y.C. Charter. Charter §163 provides that during the 6-week period (Feb. 1 through March 15) that "the books of annual record of the assessed valuation of real estate are open for public inspection, any person or corporation claiming to be aggrieved by the assessed valuation of real estate may apply for correction of such assessment," specifying in his application the grounds of any claimed illegality, and the extent of any claimed overvaluation or inequality.

Any such applicant may have a hearing before the Tax Commission, which is empowered to - "compel the attendance of witnesses, administer oaths or affirmations and examine applicants and other witnesses under oath. It shall make rules of practice for proceedings before the tax commission, and such rules and regulations as may be appropriate

and expedient to the end that the taxpayers may have a hearing in the borough in which they reside or in which their property is located" (N.Y.C. Charter, §164). Charter, §165 requires the Tax Commission to render its final determination by the 25th of May; and a further proceeding "to review or correct on the merits any final determination of the tax commission" may be brought by October 25th of that year pursuant to N.Y.C. Charter, §166.

ARGUMENT

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION PRESENTED. TAX DELINQUENTS ARE NOT DENIED DUE PROCESS WHERE THEY ARE AFFORDED ADMINISTRATIVE REVIEW OF AD VALOREM ASSESSMENTS, REFUSE PAYMENT UPON THEIR OWN CLAIMED TAXABLE VALUES PENDING JUDICIAL REVIEW OF ASSESSMENTS, JUDGMENT OF FORECLOSURE IS REQUIRED FOR WATER AND SEWER DELINQUENCIES ALONE, AND THEIR COUNTERCLAIMS FOR RENT REGULATION "DAMAGES" ARE PRESERVED FOR TRIAL.

a. Petitioners' constitutional claims are based on flagrant distortions of the record.

As previously indicated (ante, p. 2), petitioners rely upon rampant distortions of the record as a predicate for their contention that they were denied due process of law by the New York State Courts and to obscure the fact that they were afforded every opportunity to pay real estate taxes based on their own claimed taxable values

so as to obviate any alleged grievance for delayed refund.

It is thus repeatedly asserted, for example, that the impact of rent control was ignored "in the assessed valuations fixed by the City, which were large multiples of fair market value, as shown by arm's-length transactions" (Petition, pp. 15, 5, I). This is flatly belied by petitioners' acceptance of a 22% reduction in assessed values and withdrawal of tax review petitions on 7 of the 11 subject parcels upon "settlement resulting from hearing" before the Tax Commission - even ignoring the fact that the arm's-length transactions referred to reflected prices for parcels subject to heavy tax delinquencies or acquired at City auction of tax delinquent parcels (ante, pp. 3, 6-9).

Similarly unsupportable is petitioners' assertion that - "Both prior to and after the commencement of In Rem Action No. 29, petitioners made every reasonable effort to obtain a tax certiorari trial," but that the City had been "preventing petitioners' tax certiorari cases from coming to trial" (Petition, pp. 7-8). Here, again, the record belies these contentions, showing not only dismissals for failure to prosecute, but subsequent accumulation of 8 years additional tax review proceedings without filing a note of issue as to any of them (ante, pp. 10-11). As the Trial Court pointed out in its decision of August 31, 1979 - "No note of issue was filed by the petitioner in those certiorari cases nor did petitioner make any application to allow the filing of the note of issue or for a speedy trial therein"

(ante, pp. 18-19; 22a).*

It is next said that the New York Courts erred in holding petitioners' refusal to pay real estate taxes on their own claimed taxable values had mooted any due process question as to collection prior to judicial review of assessments - because the offer to pay as self-assessors pending such review was unfairly "conditioned upon petitioners' waiver of basic rights" (Petition, pp. 9-10, 14). This is belied by petitioners' own acceptance thereof on the 6 additional tax delinquent parcels acquired at City auction (ante, pp. 15-16). That the State Courts properly viewed it as a fair means of pro-

*Petitioners' assertion that they were aggrieved by the City's "refusing to hold settlement conferences" (Petition, p. 8) is likewise misleading since the record shows that the Tax Commission had afforded petitioners a hearing at which they were granted reductions on the bulk of the subject parcels (ante, p. 8).

tecting petitioners, by suspending payment of taxes on any amount above claimed taxable value pending judicial review of assessments, is apparent as well from the stipulation itself (25a-26a, 29a). The Courts in New York State will enjoin tax collection and sale of tax delinquent property where due process has been denied the taxpayer or the tax collection process abused. See, Grant v. Srogi, 42 NY 2d 496, 507, 509, 515-517 (1981) - which petitioners vainly urged in the appellate Courts of New York as applicable herein.

With the advent of the City's fiscal crisis in 1975, and consequent reduction of its delinquency period to one year (Sonmax v. City of N.Y., 43 NY 2d 253 [1977]), the City sought to induce payment of delinquencies by affording very liberal terms for installment payments

over an 8-year period (ante, p. 25). As the record shows, petitioners were afforded such opportunity as well, but declined to pay even 15% of delinquencies and the balance over 8 years (ante, pp. 14-15, 18). And when they similarly declined to pay real estate taxes based on their own claimed taxable values pending review of assessments - despite a history of failing to bring those tax proceedings to trial - the State Courts refused to tolerate further procrastination by speculators in tax delinquent parcels thus intent upon altogether avoiding payment. In this, there was no denial of due process or "confiscation" of property for non-payment of taxes as claimed by petitioners (Petition, pp. 1, 5, 9, 11, 13).

In fact, the State Court judgments were fully warranted for water and sewer delinquencies alone on 10 of the 11 sub-

ject parcels (ante, pp. 6-7) - even if there were no delinquencies for real estate taxes. Nelson v. New York City, 352 U.S. 103, 108-9 (1957). While petitioners assure this Court that "the amount of water and sewer charges was in dispute" (Petition, p. 10 fn), they conveniently fail to mention that their proof as to that "dispute" was found insufficient to overcome the statutory presumption in favor of those charges or to require any modification thereof (ante, p. 23). And similarly devoid of substance is their contention that "the City has deprived them of the right to collect rents sufficient to pay any such charges" (Petition, p. 10 fn). It is basic law that water and sewer charges, as well as taxes on rent-regulated property - "are considered to be part of the operating expenses of the building which are passed directly on to the tenants." Plaza Mgmt. Co. v. City

Rent Agency, 25 NY 2d 630, 631-2 (1969). And that the City's rent regulation effects no confiscation of property, see Benson v. Beame, 50 NY 2d 994 (1980), app. dism. ___ U.S. ___ (1981 - 49 U.S. Law Week 3530); Bowles v. Willingham, 321 U.S. 503, 517-518 (1944).*

b. Petitioners were afforded a far higher standard of due process than is required by firmly settled law.

(1)

In support of their attack upon the New York Courts for allegedly denying them a trial

*As aforenoted, petitioners' only defense to non-payment of water and sewer delinquencies was that "to pay even one further dime of tribute to the City * * * would be unconscionable" (ante, p. 17). And as also noted (ante, p. 18), each of their $1 million counterclaims for rent control "damages" were preserved by severance for separate trial - "the general rule prevailing throughout the United States is that taxes are not subject to counterclaims or setoff on the part of the taxpayer." Vil. of Charlotte v. Keon, 207 N.Y. 346, 349-350 (1913).

on real property tax review proceedings accumulated and unprosecuted since 1971/2, petitioners rely upon cases such as Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) - where a debtor was deprived of his property without prior recourse to any Court or State supervision of a creditor's seizure thereof (Petition, pp. 13; 5, 7, 9, 12, 14, 16); Cf. Mitchell v. W. T. Grant Co., 416 U.S. 600, 611-614 (1974), also cited by petitioners (Petition, p. 13) - where even such seizure was held to afford due process when effected under the supervision of a State Court.

"The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized and not to amount to the taking of property without due process of law." Leigh v. Green, 193 U.S. 79, 87-88 (1904). See, King v. Mullins, 171 U.S. 404, 436-7 (1898);

Hersee v. Porter, 100 N.Y. 409-410 (1885); City of N.Y. (801-805 E. New York Ave.), 290 N.Y. 236, 241 (1943); 3 Cooley on Taxation (4th ed.), §1326, p. 2614. So long as an ad valorem property tax "provides a grievance day" before the City's Tax Commission - "the due process clauses are not offended by summary statutory remedies for collection of ordinary taxes." City of N.Y. (801-805 E. New York Ave.), 290 N.Y. 236, 240-1 (1943); see also, Hagar v. Reclamation District, 111 U.S. 701, 708, 710 (1884); Pittsburgh & C. Ry. Co. v. Backus, 154 U.S. 421, 426 (1894); Pittsburgh & C. Ry. v. Bd. of Public Works, 172 U.S. 32, 45 (1899); Utley v. St. Petersburg, 292 U.S. 106, 109 (1934); McGregor v. Hogan, 263 U.S. 234, 238 (1928); Botens v. Aronauer, 32 NY 2d 243, 248 (1973); Hickman v. Wujick, 488 F. 2d 875, 876 (2d Cir., 1973); Mtr. of Appl'n of McMahon v. Palmer,

102 N.Y. 176, 189-190 (1887).*

(2)

"It is well established that one challenging a tax assessment must continue to pay his taxes and that the commencement of an assessment review proceeding does not stay the collection of taxes or enforcement procedures instituted by the taxing authority." Grant v. Srogi, 52 NY 2d 496, 515-516 (1981). The policy of Congress is similarly "to require prompt payment of federal taxes" (Great Lakes Co. v. Huffman, 319 U.S. 239, 301 [1943]). "The assessment is given the force of a judg-

*N.Y.C. Charter, §164 (ante, pp. 26-27) not only provides "a grievance day" before the Tax Commission, but a full hearing with the right to adduce witnesses is required by law. Reiner v. Boyland, 278 App. div. 580 (2nd Dept., 1951), lv. den. 302 N.Y. 951 (1951). As the record herein shows, petitioners had been granted a 22% reduction on 7 of the 11 subject parcels upon hearing before the Tax Commission - albeit the reduced taxes were never paid (ante, p. 8).

ment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt," the usual procedure for the recovery of debts being "reversed in the field of taxation. Payment precedes defense.'" Bull v. United States, 295 U.S. 247, 259-260 (1935); see, Phillips v. Commissioner, 283 U.S. 589, 595-6, 599 (1931); Chapman v. Zobelein, 237 U.S. 135, 138-9 (1915).

And the firmly established rule that "one challenging a tax assessment must continue to pay his taxes" since an assessment review proceeding does not stay enforcement procedures, is especially applicable where the taxpayer refuses to pay not only the allegedly excessive tax, but any taxes at all. As stated in The State Railroad Tax Cases, 92 U.S. 575, 616, 613-614 (1876) -

"is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due."

(3)

As previously detailed herein, the City did not demand payment of any ad valorem taxes deemed excessive by petitioners but, to the contrary, that they only pay such taxes as were conceded by their own claimed taxable values as self-assessors pending judicial review of the allegedly excessive assessments. Such payment would have effectively obviated any necessity for refunds and, as the State Courts found, effectively mooted any conceivable due pro-

cess question based on petitioners' unsupportable position that judicial review of assessments must precede payment. In addition, and as the record before the State Courts show - foreclosure judgments were required on 10 of the 11 subject parcels for water and sewer delinquencies alone; petitioners were afforded a grievance day on the ad valorem real estate assessments, as required by due process; their petition for further judicial review thereof had been unduly delayed by petitioners' non-prosecution thereof; and they had been repeatedly afforded opportunities to redeem their parcels from the delinquency list prior to foreclosure, and to mandatory release thereof after foreclosure - on an installment basis providing many years for payment in each instance (ante,

pp. 6-7, 38, 14-15, 18).*

(4)

Finally, citing Rosewell v. LaSalle National Bank, 49 U.S. Law Week 4285 (1981),

*To overcome the State Court's finding that petitioners had unreasonably delayed prosecuting those tax review proceedings for almost a decade (22a) - as to which petitioners are silent - they resort to the diversionary argument that after decision herein in August of 1979, and entry of judgments in May of 1980 (5a, 20a-24a; 6a-19a), the Supreme Court, New York County in December of 1980 temporarily stayed all tax review proceedings "pending final Appellate determination of Colt Industries v. Tax Comm." (27a; Petition, pp. 7, 9, 15). In Colt Industries, (183 N.Y.L.J. [No. 108], p. 10, June 4, 1980) that Court had held equalization rates fixed by a State Board for state-aid purposes as inadmissible on review of City assessments since such review is governed by special law (N.Y.C. Admin. Code, §166-1.0) requiring that inequality be shown by "property of like character in the same ward or section." (See N.Y. Laws of 1979, ch. 126, §1; 49A McKinney's Consol. Laws of N.Y. [1980 Supl., pp. 239-240], Real Property Tax Law, §720[3]). It then stayed further trials until its view as to the proper way to prove inequality was ruled on by the appellate courts. The Appellate Division affirmed Colt Industries on May 4, 1981 (439 N.Y.S. 2d 24); and expedited appeal to the N.Y. Court of Appeals has been perfected by Colt Industries.

petitioners contend that ad valorem taxes need be paid "only when a reasonably prompt subsequent adjudication of the merits is clearly available" (Petition, p. 14). The taxpayer had there been judicially awarded refunds on overassessments for 3 successive years before she withheld payment for the fourth year on the same assessment repeatedly found excessive by the State Courts - "Respondent contended that, by requiring payment of taxes 3 1/2 times the lawful amount, petitioners deprived her of equal protection and due process" (49 L W at pp. 4286-7). A 2-year delay in effecting refund of such excess was held insufficient to support Federal Court intervention to stay forcible collection for failure to pay the excessive taxes (28 U.S.C., §1341) - despite the taxpayers contention that assessment practices "produced egregious

disparities" ranging from "as low as 3% and as high as 973% of fair market value" (49 LW at p. 4287). This Court there emphasized, moreover, the "compelling nature" of long-established policy not to frustrate local tax collection procedures (ibid., at p. 4292).

Here, petitioners were afforded every opportunity to avoid payment of excessive taxes by paying only the amount due on their own claimed taxable values as self-assessors pending judicial review of assessments. And this, despite the fact that they had never prosecuted any of their decade-old tax review proceedings so as to show overassessment or entitlement to any refunds plus interest (Gen. Mun. Law, §3-a; 23 McKinney's Consol. Laws of N.Y.) had the delinquencies actually been paid. As previously detailed, moreover, petitioners were dealers in tax delinquent properties unwilling to pay delinquencies

on any basis, no matter how moderate the terms - very liberal installment payments over a period as long as 8 years being rejected by them; and, as already detailed, the bulk of their parcels were subject to foreclosure for non-ad valorem delinquencies (water and sewer charges) alone.

While petitioners baselessly charge that "deliberate actions of the City" obstructed judicial review of their real estate assessments (Petition, pp. 7, 8-9, 14-16) - as aforenoted, the State Courts not only found to the contrary (22a), but will enjoin collection where such judicial remedies have been obstructed by a municipality (ante, p. 32).*

*As a further diversionary ploy, petitioners rely on "reports" dehors the record in asserting that "the City has refused to permit taxpayers generally to gain access" to real

(footnote cont'd on next page)

There is, in short, no substantial constitutional question here presented and, as speculators in tax delinquent parcels, petitioners present no case "of great public importance" (Petition, p. 15) - despite the flagrant distortions of the record, and "supplementary" material dehors the record, relied on to suggest the contrary.

* (footnote cont'd from previous page)

property transfer tax records to aid them in proving inequality (Pet., pp. 15-16). Such records are statutorily required "to be secret" (N.Y.C. Admin. Code, §II 46-15.0; 5 Williams [1971 ed.], p. 220) so as to protect the confidentiality of data furnished by taxpayers. See, Taxation & Fin. v. Dept. of Law, 44 NY 2d 575, 578-9 (1978).

Conclusion

The petition for a writ of certiorari should be denied.

August 12, 1981.

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel
of the City of New York
Attorney for Respondents.

LEONARD KOERNER,
MORRIS EINHORN,
of Counsel.

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2188

IN THE

Supreme Court of the United States

October Term 1980

FRIARTON ESTATES CORP., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RICHARD AYRES GIVENS
BOTEIN, HAYS, SKLAR & HERZBERG
200 Park Avenue
New York, New York 10166
(212) 867-5500
Counsel of Record for Petitioners

ROGER F. BLOOM
GINA SCHACHTER
BOTEIN, HAYS, SKLAR & HERZBERG
Of Counsel for Petitioners

TABLE OF CONTENTS

	PAGE
Summary	1
Point I—Contrary to Corporation Counsel's Claim, The Facts Clearly Show a Substantial Constitutional Question and Indeed Violation	2
A. The Prior As Well as Present Owners of the Properties Being Confiscated Are Parties	2
B. The City's "Self-Assessment Offer" Seeking to Moot the Owners' Constitutional Right to a Trial Was a Sham	3
C. The Owners' Numerous Efforts to Obtain a Trial on the Merits Were Denied	4
D. Water and Sewer Taxes Were Never Relied Upon by the State Courts and Were Substantially Disputed	6
E. New York City Tax Commission Action Was Never Intended to Be, and Is Not, a Substitute for Judicial Relief	7
F. Settlements as to Some Parcels by Some Owners for Some Years Are Irrelevant	8
Point II—The Cases in this Court Cited by the City Do Not Support Its Contention That Its Procedures Can Leave a Taxpayer Remediless	10
Conclusion	10

TABLE OF CONTENTS OF APPENDIX

PAGE

Documents Sumitted to State Supreme Court, from Record Before Appellate Division:

Affidavit of Edward A. Friedman, 11/20/78 ..... 1 ra

Affirmation of Edward A. Friedman, 10/16/78 1 ra

Affirmation of Martin R. Fine, 11/15/79 ..... 2 ra

Affirmation of Martin R. Fine and attachments, 10/16/79 ..... 5 ra

Language Deleted by the City from Stipulation as to Certain Parcels, Filed in State Supreme Court, 11/9/79 ..... 8 ra

Comparison of Assessed Values and Fair Market Value Based on Actual Purchase Prices on Parcels Purchased at City Auctions Based on Record Below, Submitted to Appellate Division ..... 8 ra

TABLE OF AUTHORITIES

PAGE

Cases:

Colt Industries v. Tax Comm'n, 439 N.Y.S.2d 24 (N.Y.Sup.Ct., App. Div., 1st Dept. 1981) 6

Freewalt Realty Corp. v. Finance Adm'n, N.Y.L.J. 12/5/80 (Sup.Ct.N.Y.Co.) 5, 7

Gardner v. Broderick, 392 U.S. 273 (1968) 3, 6

Hagar v. Reclamation District, 111 U.S. 701 (1884) 9

Matter of 749 Broadway Realty Corp. v. Boyland, 1 Misc.2d 575 (Sup. Ct. N.Y.Co. 1955), *aff'd* 1 A.D.2d 819 (1st Dept. 1956), *aff'd*, 3 N.Y.2d 737 (1957) 7

Nelson v. City of New York, 352 U.S. 103 (1956) 6

Phillips v. Commissioner, 382 U.S. 589 (1931) 9

Rosewell v. LaSalle National Bank, 49 U.S.L. Week 4285 (1981) 10

Utley v. St. Petersburg, 292 U.S. 106 (1934) 9

United States Constitution:

Fourteenth Amendment, §1 ..... *passim*

Statutes:

Federal:

28 U.S.C. §1257(3) 10

28 U.S.C. §1341 10

State:

New York City Charter §166 7

Rules:

Rules of the Supreme Court of the United States:

Rule 22.6 6

Rule 28.1 2

No. 80-2188

IN THE

Supreme Court of the United States

October Term 1980

FRIARTON ESTATES CORP., *et al.*,
Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Summary

In its brief in opposition to the Petition for Certiorari, counsel for the respondent City of New York, appears to seek to convince this Court that the facts in this case are so complex, disputed and obscure that no substantial constitutional question can be discerned amid the multitudious assertions of the parties. The contrary is the case.

The underlying facts are not subject to serious dispute, and clearly show a substantial constitutional question, and indeed, it is submitted, a clear violation of the Fourteenth Amendment's protection against taking of property without due process and in violation of equal protection.

The City has not even attempted to refute the uncontradicted showing in the Petition that the tax assessments were grossly inflated and unequal, that the properties are sustaining losses due to City mandates, and that all trials where inequality is claimed are now stayed. It is uncontroverted that the properties suffered large operating losses because of the nominal rents (e.g. $49.87, R 516)* permitted, artificially high assessments and legally required services.

POINT I

Contrary to Corporation Counsel's Claim, The Facts Clearly Show a Substantial Constitutional Question and Indeed Violation.

A. The Prior As Well As Present Owners of the Properties Being Confiscated Are Parties.

Corporation Counsel argue that petitioners Friarton Estates Corp. and Brontel, Ltd. purchased the properties involved subject to tax deficiencies and hence cannot be heard to complain (RB i, 29). This ignores the undisputed fact that the former owners of each parcel who stand to lose mortgage rights if the properties are confiscated, were also made parties both here and below (Pet. 5); petitioners collectively represent ownership of the properties since 1973. The City's argument amounts to seeking to split the interests of petitioners and then urging that the claims of some alone are insufficient.

---

* References to the Record before the Appellate Division of the Supreme Court of the State of New York are in the form "R ——," to Respondents' Brief Opposing Petition for a Writ of Certiorari in the form "RB ——," to the Petition for a Writ of Certiorari in the form "Pet. ——," to the Appendix to the Petition in the form "——a," and to the Appendix to this Reply in the form "——ra." For the statement as to parties under Rule 28.1, see Pet. II.

B. The City's "Self-Assessment Offer" Seeking To Moot the Owners Constitutional Right To a Trial Was a Sham.

Corporation Counsel also asserts that the owners unreasonably refused offers to pay the taxes assessed on an installment basis or even to pay what would be due based on their own valuations of the properties "pending judicial review and 'correction' thereof" (RB ii, see RB 3-5, 14-15). This ignores the crucial undisputed facts that:

1. The City's self-serving "offer" included requirements, not quoted in its brief (RB 14-15) that (a) the owners' pending motions for relief in the courts be withdrawn, (b) any default even by one minute or for a one penny error would permit "the City's entry of summary judgment *ex parte*" confiscating the properties and (c) "this arrangement . . . will not be introduced in any way at the [tax] certiorari trial" (29a). The fact that some owners accepted these unfair terms and minimal reductions on some parcels for some years under duress hardly means that the Fourteenth Amendment permits these owners to be required to accept such dictated terms to avoid confiscation. Compare *Gardner* v. *Broderick,* 392 U.S. 273 (1968) (required waiver of Fifth Amendment invalid).

2. The properties suffered substantial negative cash flows due to the City's rent restrictions and mandated services (Pet. 6-7). Hence only infusions of outside funds could permit the payment of any taxes at all (see 2, 5 ra). Yet any investor or prospective mortgagee would obviously need to know the ultimate tax lien on the property in order to make an investment or mortgage loan. But a ruling on the merits of the taxes due was made impossible by the City's successful opposition to the owners' repeated efforts to obtain a trial on the merits (discussed in Point I(C) below and outlined at Pet. 7-8). The "offer" was

not accompanied by any guarantee of a trial on the merits in the foreseeable future (29a).*

C. The Owners' Numerous Efforts to Obtain a Trial on the Merits Were Denied.

Corporation Counsel seeks to cast the blame for lack of a trial on the merits of the assessments on the owners (RB 4, 12-18, 30-44), but never denies the City's continuous and successful opposition to such trials since 1977 and indeed earlier (Pet. 7-8).

The City's tactic was initially successful before the State Supreme Court because that court erroneously found that notes of issue were not filed by the owners in the tax certiorari cases (22a, RB 12-18, 30-44). Actually, such notes of issue had in fact been filed in June and July of 1979, after the owners had to fulfill burdensome procedural preconditions chiefly productive of delay (3-5 ra), and were brought to the attention of the State Supreme Court long before judgments were entered (3-7 ra). On appeal to the Appellate Division and the State Court of Appeals, the City abandoned any contention that these notes of issue had not in fact been filed. The City's erroneous contention, it is submitted, should not have been resurrected in this Court.

Numerous further efforts by the owners to obtain an immediate trial on the merits of their claims proved uni-

---

* Corporation Counsel also argues that the owners could have avoided confiscation by a "token" initial payment of 15% of the inflated amounts claimed for numerous prior years with the balance payable in installments (RB 12, 14-15). This ignores the facts that (1) no trial on the merits was ever provided or assured by the City, (2) the owners would have to pay the full greatly inflated assessments and (3) the owners would be totally unable to obtain financing while the huge challenged tax liens remained on the properties.

formly unsuccessful because of the City's determined opposition to any trial on the merits (see 1-7 ra; Pet. 7-9).*

Corporation Counsel's reference to petitions dating from 1963/4 having been "stricken from the calendar for failure to prosecute" (RB 10) omits the fact that this action involving prior owners (see 3 ra) occurred in 1970 (R 248) and could not possibly affect the years involved in this case.

Corporation Counsel's statement that the City "insisted that the [tax] certiorari proceedings be calendared, so that a final determination of assessments can be made" (RB 15) is a quotation from a conclusory statement by the City itself (R 508-510) with no factual support, flatly contradicted by the physical deletion by the City of a proposed clause requiring that the City not oppose a preference for trial (8 ra). Trials have also been denied since 1973 with respect to refunds claimed on taxes paid (R 198, 215).

Corporation Counsel claims that petitioners seek to to rely on evidence outside the record (RB 2, 5), but ignores the fact that the only extra-record item cited as to the merits is a subsequent published State Court decision, *Freewalt Realty Corp.* v. *Finance Administrator,* N.Y.L.J. (Sup. Ct. N.Y.Co.), Dec. 5, 1980, p. 6, set forth at 27a, which confirmed the City's successful blockage since 1975 of tax certiorari trials where inequality of assessment was claimed.

As is undisputed, the City obtained an *ex parte* blanket stay of all cases in which inequality of assessments were claimed (Pet. 9). Corporation Counsel's effort to explain this amazing event (RB 42n) ignores the fact that the stay blocked completely trials of cases involving any in-

* Corporation Counsel (RB 31n) also seemingly seeks to confuse settlement conferences before the City Tax Commission as to some years as to some parcels, with those required as a precondition to trials on the merits of tax certiorari cases. It is undisputed here that the City delayed the latter as a means of avoiding trials on the merits of the assessments (3-4 ra).

equality claims, so that no trial even on overvaluation could be had unless the owners waived their inequality claims. Cf. *Gardner* v. *Broderick, supra.**

D. Water and Sewer Taxes Were Never Relied Upon by the State Courts And Were Substantially Disputed.

Corporation Counsel asks this Court to bypass the constitutional issues raised by the Petition on the ground that default in payment of claimed water and sewer charges alone would justify foreclosure (RB iii, 34). The State Courts never relied upon or even mentioned any such ground (20a-26a). Moreover, many of the parcels involved had been vacant for a long period during which there was no water or sewer usage (R 475, 479).**

---

* The City's explanation that a test case, *Colt Industries* v. *Tax Comm'n*, 439 N.Y.S.2d (App. Div. 1st Dept. 1981) should be completed first is out of place since *Colt* involves a Park Avenue office building, raising issues hardly similar factually or legally to those concerning the rent-controlled and vacant properties, involved here. Meanwhile the City seeks to confiscate petitioners' properties for failure to pay taxes on which review proceedings have not only been blocked for years, but are now hermetically sealed at the City's request.

The City's suggestion that its separate obstruction of efforts to compare assessments is derived from the secrecy of tax returns (R 46n) is also contradicted by published data showing that the information is on public record and merely overwhelmingly difficult and expensive to collect (37a-40a).

Furthermore, Rule 22.6 of the rules of this Court specifically provides that even after briefing is completed, subsequent decisions of relevance may be called to the attention of the Court.

The other non-record material made part of the Appendix to the Petition (28a, item 2, 30a-43a) was cited not on the merits but rather to indicate that the question presented by the Petition is of substantial public importance (Pet. 15-16). That contention is only marginally questioned by Corporation Counsel (RB 46), based on irrelevant prejorative categorizations of the petitioners without record support (RB 44).

** *Nelson* v. *City of New York*, 352 U.S. 103 (1956), cited by Corporation Counsel in support of its contention (RB iii, 34) dealt with a situation where the water and sewer charges were undisputed.

(footnote continued on next page)

E. New York City Tax Commission Action Was Never Intended To be, and Is Not a Substitute for Judicial Relief.

Corporation Counsel contends in this Court that the judgments below should be sustained on the ground, never mentioned by the State Court (20a-26a) that administrative City Tax Commission proceedings constitute adequate due process to support confiscation of petitioners' property (RB 37-38). State law, however, does not regard the Tax Commission as the place to obtain a definitive ruling on tax matters, but expressly provides for judicial adjudication. New York City Charter § 166, RB 27; see *Matter of 749 Broadway Realty Corp.* v. *Boyland*, 1 Misc.2d 575 (Sup. Ct. N.Y. Co. 1955), *aff'd*, 1 A.D.2d 819 (1st Dept. 1956), *aff'd*, 3 N.Y.2d 737 (1957). Moreover, it was undisputed below that Tax Commission proceedings are not actual adjudications but rather settlement discussions, and that the City has created a "rule" that waivers of rights as to all but the two current years are mandatory to obtain any relief at this intermediate procedural stage (2-3 ra).

Thus, neither the State Courts, state law nor the facts afford any support to Corporation Counsel's effort to sidestep the clear implications of the City's successful asphixiation of the owners' only real State remedy, the tax certiorari proceedings. See *Freewalt Realty Corp.* v. *Finance Administrator, supra* (27a; see also 28a).

In addition, of course, the large continuing losses incurred by the properties due to the City's restrictions, combined with the inability to obtain a ruling on the total tax due, made financing to pay these taxes unavailable. And payment of water and sewer charges alone would of course not have stopped foreclosure in any event. No procedure existed which would have accomplished that result. Undoubtedly it was for this reason that the State Courts chose to deal with the substance of the matter and not to seek to foreclose petitioners' rights on such a technicality.

F. Settlements as to Some Parcels by Some Owners for Some Years Are Irrelevant.

Corporation Counsel claims (RB 29) that petitioners' assertion that the assessments are in large multiples of fair market value (Pet. 5, citing R 353, 478-79, 531, 533) is "flatly belied by petitioners' acceptance of a 22% reduction in assessed values" on certain parcels for two years. The low fair market values in concededly arm's-length transactions necessarily flowed from long-sustained undisputed operating losses on the properties (Pet. 6), documented in the record (R 181-191, R 353, 478-79, 531, 533). It is not disputed that the reasons for the low prices paid (e.g., 8 ra) were the large continuing losses caused by the token rents mandated by the City, combined with expanding mandated services, and the artificially high assessments in issue; which it has not denied were based on valuations in high multiples of sale prices (Pet. 6-7). The validity of the rent controls which contributed to these losses is not in issue here as Corporation Counsel seeks to imply (RB 35), but merely the fact of such controls, leading to such losses and the denial of a trial on the effect of all of the City's actions on the actual value of the properties.

The City's assessed valuations even on those parcels purchased directly from the City without tax arrears after former owners had such properties confiscated, were as high as 1500% of fair market value (8 ra).

Settlements favorable to the City as to some parcels as to some years merely reflected the City's strong bargaining position based on its successful opposition to trials on the merits of assessments. This should hardly affect the owners' rights to contest on other years or other parcels. Corporation Counsel has cited no case even remotely suggesting that settlements as to some items in dispute are relevant to issues were not settled.

Furthermore, there were no settlements for any years as to the most significant parcels, especially the largest Block, No. 735, Lot 30 (R 477-78).

POINT II

The Cases in this Court Cited by the City Do Not Support Its Contention That Its Procedures Can Leave a Taxpayer Remediless.

Corporation Counsel seems to assert that summary tax collection procedures can be sustained even if no reasonably prompt adjudication of the merits is available. This astounding proposition is contrary to the core principles of due process and is unsupported by the cases in this Court cited by Corporation Counsel (RB 36-39).*

None of these cases involved a situation such as that here where a remedy on the merits was deliberately blocked or deferred "indefinitely" (27a).

For example, in *Phillips* v. *Commissioner*, 283 U.S. 589, 596-97 (1931), cited by Corporation Counsel (RB 39), this Court said:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."**

---

* Corporation Counsel also implies that petitioners are somehow foreclosed because counterclaims are banned in tax foreclosure cases (RB 11), ignoring the fact that petitioners' claims were also raised as defenses (R 449-50) which the State Court thought might have merit but were "mooted" (22a, 26a).

** In *Hagar* v. *Reclamation District*, 111 U.S. 701, 711-12 (1884), also cited by Corporation Counsel (RB 37), this Court said that where the taxpayer may "set forth, by way of defense, all his grievances" in a judicial hearing, numerous prior decisions "are all satisfied where a hearing in court is thus allowed."

In *Utley* v. *St. Petersburg*, 292 U.S. 106, 109 (1934), cited at RB 37, this Court held that:

> "There is no constitutional privilege to be heard in opposition at the launching of a project that may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land [citations omitted]."

The Tax Injunction Act, 28 U.S.C. § 1341, paradoxically relied upon by Corporation Counsel in opposition to the Petition for a Writ of Certiorari (RB 43), reflects long-standing recognition that due process is offended where taxes are enforced but no "plain, speedy and efficient" remedy is available in the State Courts. If, as seems clear from *Rosewell* v. *LaSalle National Bank*, 49 U.S.L. Week 4285 (1981), delaying such a remedy "indefinitely" (27a) would justify federal equity intervention, *a fortiori* it is a basis for petitioners' effort to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3).

Petitioners do not claim as Corporation Counsel implies (RB 38) that commencement of an assessement review proproceeding automatically stays tax enforcement, but only that adjudication must be available at some foreseeable point. Seven years of delays deliberately caused by the City with no end in sight (Pet. 8, R 448) would seem enough.

The public importance of the questions presented are hardly disputed. Taxes not based on realities of cash flow in rent-restricted housing, combined with indefinite denial of trials on such claims, not only destroy neighborhoods (31a) but deprive the buildings of the funds needed for essential services for the residents (2, 5 ra).

Conclusion

The petition for a writ for certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

Richard Ayres Givens
Botein, Hays, Sklar & Herzberg
200 Park Avenue
New York, New York 10166
(212) 867-5500
Counsel of Record for Petitioners

APPENDIX

Affidavit of Edward A. Friedman, 11/20/78, Submitted to State Supreme Court (R 269-70)

11. * * * [The City] sets forth allegations that the City's Real Estate Tax Division has a tremendous backlog of certiorari cases on its calendar in all the City's Boroughs, and particularly in New York County. As a result of the City's delay, unless this Court grants [the owners'] motion for consolidation and/or an immediate trial of said cases, the [owners] will not have [their] day in Court until after some time in 1980 when any relief the Court may then grant would be moot.

Affirmation of Edward A. Friedman, 10/16/78, Submitted to State Supreme Court (R 129-30)

12. The defendant [owner] herein was finally able to file an "eight-month notice" on July 13, 1978 . . . This eight-month notice gives the City an opportunity to examine the income and expense statements submitted along with said notice and to have a settlement conference with the defendant herein (who is the petitioner in the certiorari proceedings). But upon information and belief, the City of New York has not made an offer in the past several years to any petitioner in any court proceeding based on an eight-month notice.

13. Upon the expiration of said eight months and/or if this Court orders otherwise, or if the City were to agree to waive the eight month requirement, the defendant herein is prepared to serve and file a note of issue on all the pending

proceedings. In fact, the defendant herein is prepared to go to trial in said proceedings at any date agreeable to the City of New York. It is respectfully submitted to this Court that no offer of an early trial in said proceedings will be forthcoming from the City and in fact, it is submitted that the City will resist any effort to bring these cases to an early resolution.

Affirmation of Martin R. Fine, 11/15/79, Submitted to State Supreme Court (R 608-11)

25. In February of 1979, there was absolutely no money to pay real estate taxes because the actual operating cost of the properties was in a deficit position and the respondents owed staggering sums of money to fuel oil dealers which, if not paid, would result in a cutoff of oil deliveries, which would lead not only to an immediate physical destruction of the properties, but would subject respondents to criminal prosecution under the City's same strangulating web of laws, rules and regulations.

* * *

27. In Paragraph 9 of the City's affirmation in opposition, dated November 9, 1979, certain citations are made for the purpose of making this Court believe that any true and meaningful tax commission hearings have been held by the City which vaguely offered respondents "due process" with respect thereto. . . . the so-called "tax reduction hearings" are cursory thirty-second reviews of the files at which time no meaningful relief is ever offered by the City.

28. Furthermore, the City has adopted another obstructive rule pursuant to which the City will only settle two

years cases at a time and would require the respondents to waive all its rights to prior years in order to get even a slight reduction in the two most current years.

29. The City of New York would have this Court believe that it was respondents that deliberately delayed filing of the notes of issue herein (which have been filed, and the cases are now presently ready for trial). The facts are quite the opposite. Firstly, because the properties were forced into mortgage foreclosure proceedings by virtue of their inability to pay their operating expenses because of the City's confiscatory rent control laws and confiscatory real estate taxes, the previous owners "walked away" from the properties and management thereof was taken over by a receiver for the mortagees. As a result, the financial records of the properties were a shambles and difficult to put together; the City's rules and regulations required verified financial statements to be submitted to the City prior to filing the note of issue. The respondents herein (with respect to Block 735, Lot 30 and Block 1042, Lots, 2, 3, 4, 5, 6, 7 and 64) only acquired title to the property in July of 1977, and immediately began the awesome task of putting together all the necessary financial records required by the City prior to placing the tax certiorari cases on the calendar.

30. Furthermore, the then rules of the New York State Supreme Court, Section 660.18(c)2(ii) required the respondents to file a so-called "eight month" (request for hearing) notice prior to filing a note of issue, allegedly for the purpose of giving the City the opportunity to settle these cases during such eight month period, prior to permitting respondents to actually file a note of issue. In fact, in July, 1978 and August 1978, as soon as such records were

available, the respondents caused to be filed such "eight month notices" (requests for hearing). . . . Despite the fact that such eight month notices were filed, the City for years and years—and this is a fact of which the Court can take judicial notice and which the City cannot deny—failed and refused to hold *any* eight month notice hearings and simply stalled and stalled the tax certiorari calendars for their own confiscatory and devious purposes. It ill lies in the mouth of the City to claim that respondents have delayed herein. In fact, the opposite is true.

31. Promptly after the required eight month period had passed (the City still refusing to hold a settlement hearing in flagrant violation of the aforesaid rules of the Appellate Division, 660.18(c)), the respondents filed the notes of issue, as annexed as Exhibits A and B to the Fine affirmation [set forth at 7-8 ra below].

32. Since the notes of issue herein have long ago been filed and the cases are presently ready for trial, and no judgment has been entered in Action No. 30 (by the City's own admission) and the Court properly granted a consolidation of Action No. 29 and Action No. 30 with respect to the captioned parcels, and the City admits that no judgment of foreclosure will be entered in action No. 30 until at least March of 1980, there does not appear to be any reason why this Court should not grant, at least, respondents' motion herein for a trial preference in these consolidated actions, so that the tax certiorari trial with respect to these parcels can immediately proceed. The City of New York will incur no prejudice thereby.

33. The respondents herein have, since acquiring title to the premises in 1977, attempted, through a vast infusion of funds, effort and labor, to rehabilitate the occupied parcels herein involved; tens and tens of thousands of dollars have been spent by respondents for repairs and renovations of the occupied parcels, to wit, Block 735, Lot 30 (which consists of approximately 12 tenanted buildings) and Block 1042, Lots, 2, 3, 4, 5, 6, 7 and 64 (which consist of approximately 8 tenanted buildings).

Affirmation of Martin R. Fine, 10/16/79, Submitted to State Supreme Court and Attachments (R 539-541)

[T]his Court should grant the relief of consolidation of the In Rem tax foreclosure proceedings and the tax certiorari proceedings requested in the original cross-motions herein, and grant such other and further relief as the Court may deem just and equitable including, but not limited, to granting trial preferences to these parcels in the pending tax certiorari proceedings . . .

Exhibit A—Note of Issue for Block 735 Lot 30 Annexed to Foregoing Affirmation

NEW YORK COUNTY CALENDAR CLERK'S OFFICE

GENERAL EQUITY CALENDAR

Calendar No. 40515

MID-CENTRAL PROP.

vs

TAX COMM., Block 735 Lot 30

[STAMPED AS FILED]
Jul 3, 1979
Calendar No. 40515

• • •

NATURE OF ACTION OR SPECIAL PROCEEDING
Tax certiorari

Exhibit B—Note of Issue for Block 1042, Lots 2-7, 64 Annexed to Foregoing Affirmation

MID-CENTRAL PROPERTIES

vs

DEPT OF FINANCE & TAX COMM.

[STAMPED AS FILED]
Jun 26, 1979
Calendar No. 40505

• • •

NATURE OF ACTION OR SPECIAL PROCEEDING
Tax certiorari

[Block 1042, Lots 2, 3, 4, 5, 6, 7, 64]

Language Deleted by the City from Stipulation as to Certain Parcels Filed in State Supreme Court 11/9/1979 (R 591)

Upon completion of such audit, the City will attempt in good faith to negotiate a settlement of the tax certiorari proceedings with defendants. If such settlement is not reached by May 15, 1979, defendants will move for a preference for their pending actions, which will not be opposed by the City.

Comparison of Assessed Values and Fair Market Value based on Actual Purchase Prices on Parcels Purchased at City Auctions Based on Record Below Submitted to Appellate Division (R 181-191)

Block/Lot	*Fair Market Value Based on Actual Purchase Price*	*Assessed Value*	*Assessed Value as Percentage of Fair Market Value (Nearest 100%)*
1621/65	$1,000 (1976)	$15,000	1500% (15 times)
1599/49	$ 900 (1976)	$11,500	1200% (12 times)
440/51	$2,500 (1975)	$22,000	900% (9 times)